IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-363

PETER H. MADDEN AND MICHAEL J. MADDEN,

*Petitioners,*

v.

MERCANTILE-SAFE DEPOSIT AND TRUST COMPANY, Trustee of the Trust u/w of William R. Hammond, deceased, and in its individual capacity; AUDREY COSDEN; and the following parties listed of record, but inactive in the court of last resort below, namely CHRISTINA L. MADDEN, ANNE M. HALLENBECK, JAYNE M. HUMPHREYS, and SHARON MECH, official reporter of the trial court,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI
To The Court of Appeals of Maryland and
To The Court of Special Appeals of Maryland

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**MISCELLANEOUS**



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To The Court of Special Appeals of Maryland

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To The Honorable, the Chief Judge and Associate Judges of the Supreme Court of the United States.

Peter H. Madden and Michael J. Madden, the petitioners herein, pray that a writ of certiorari issue to

review the judgment of the Court of Special Appeals of Maryland entered in the above-entitled case on April 12, 1979 and the order of the Court of Appeals of Maryland denying review thereof.

## OPINIONS BELOW

The Court of Appeals of Maryland denied application to review this case by its order of June 6, 1979. There was no opinion. The order appears in the Appendix at page 1a.

That order left standing the prior mandate of April 12, 1979 of the Court of Special Appeals of Maryland. That court's opinion is reported at 41 Md. App. 519, 398 A.2d 460 (1979) and appears along with their controlling mandate in the Appendix at pages 2a and 40a.

The foregoing action of the Court of Special Appeals affirmed, with minor exception not relevant here, the final order and decree and unreported opinion of trial judge D. Ross, who sat in equity and without a jury as the Circuit Court of Baltimore City. His *nisi prius* oral opinion and final order and decree of September 14, 1976 appear in the Appendix at pages 44a and 64a.

In a prior appeal, the Court of Special Appeals reversed the trial judge, D. Ross, for dismissing the suit in mid-trial. That earlier action of the Court of Special Appeals in reversing the trial judge's dismissal in mid-trial is reported at 27 Md. App. 17, 339 A.2d 340 (1975). The opinion and related mandate appear in the Appendix at pages 67a and 101a.

Trial judge D. Ross' earlier and reversed unreported opinion and reversed final order and decree of May 23, 1974 appear in the Appendix at pages 103a and 114a.



## JURISDICTION

The date of entry of the first-mentioned order of the Court of Appeals of Maryland was June 6, 1979.

No rehearing is involved.

This petition is filed within the 90-day period from the entry of that order of the court of last resort below.

Jurisdiction here is under 28 U.S.C. § 1257(3).

## QUESTIONS PRESENTED

In 1972, the petitioner-remaindermen brought this suit against the respondent trustee Mercantile seeking surcharge damages for Mercantile's deliberate breach of trust in selling from the trust on March 21, 1947 the famous and valuable Pimlico Race Track[1] for a grossly inadequate price of $1,115,000 to a group of Maryland insiders whose purchasing corporation, the Jockey Club had been the long-term tenant at Pimlico.

The corporate buyer, the Jockey Club had been installed in 1908 to conduct the racing and gambling for the creator of the trust. It was always under affirmative covenant to operate the business for the owner and

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[1]The trust owned and sold the Pimlico Race Track business assets consisting of the trade name, race names, land, plant and earning power. The Jockey Club, tenant contributed $200,000 in the form of its management organization and cash. These assets are discussed below in the Statement at pages 18-24. At the very back of this Petition, there are three photographs of the Pimlico plant taken ten days before the sale.

subsequently the trust. In return, the Jockey Club was authorized to retain the earnings net after all operating, carrying and capital improvement charges had been met and after a fixed and later a percentage annual rental reserved had been paid to the owner and subsequently to the trust.

Out of corrupt motive, the 1947 sale price of $1,115,000 forced on the trust by the trustee's deliberate action failed to compare at all with the appraised value of Pimlico Race Track.

The Pimlico physical assets of land and plant ex earnings were worth $3.4 million.

The preceding five-year average net earnings had been $644,393.

Historically, Pimlico had been held in the trust as a proprietorship. It was sold as such.

By comparison with other race track sales at our sale date, the Pimlico proprietorship had a capitalized earnings value or investment return value of $6.6 million.

If sold as a corporation subject to the 38% corporate tax rate in force, Pimlico would have had somewhat lower earnings and a capitalized earnings value or investment return value of $4.7 million.

Given those circumstances, the trustee acted deliberately in offering Pimlico to the Jockey Club insiders *on a private basis and without open and competitive bidding* so that the underpriced race track sale would go through with the Jockey Club and without the public bidding up the price to true value.



Thus, the trust was denied the protection from the trustee's rigged sale price to the Jockey Club insiders which a publicly advertised, competitive market sale would have afforded.

Being infants at the time and unfamiliar with the trust anyway, the petitioner-remaindermen had no knowledge of the breach of trust.

When the trust terminated in 1972, the petitioner-remaindermen were put on notice of the trust's 42-year ownership of the race track, the private sale, the inadequate sale price and some of the surrounding conflicts of interest prompting the 1947 trust raid.

Once having gained that knowledge, the remaindermen immediately brought suit here to have the Maryland judiciary compel the trustee to make the trust whole from its corporate treasury for not only the 1947 initial capital loss on the sale itself but also for the ever-mounting consequential damages arising from the fact that the siphoned 1947 investment capital has been missing and therefore has since 1947 been unproductive of appreciation to offset inflation and has likewise been unproductive of income.

Based on *blatantly unconstitutional rulings as to valuation and testing for price inadequacy*, the remaindermen were dismissed below by *the Maryland judicial branch*.

The Maryland judiciary's *un*constitutional theory for denial of surcharge was founded on the necessarily arbitrary and subjective *view and rulings* that in valuing the race track and in testing the $1,115,000 sale price for

inadequacy and surcharge, the controlling standard was not to be the marketplace pricing for such a race track as Pimlico and was not to be what the decisions of this Court hold should apply—namely the constitutional standard of "full fair market value" for Pimlico at its "highest and best use".

Instead, rejecting the constitutionally required standard announced by this Court, the Maryland judicial branch *un*constitutionally held that for purposes of testing the sale price of $1,115,000 for inadequacy, Maryland law does not require that the test be made at "full fair market value" and for the "highest and best use" of the race track, but rather requires *that the business assets be disregarded or accorded no weight* and that the controlling standard be "*land salvage value*".

In support of this novel and incorrect standard for valuation, the Maryland judicial branch *arbitrarily and irrationally presumed as a matter of law that the Pimlico plant and earnings values were worthless* and that the land underneath the race track valued not for race track use, but for alternative residential use was the sole criterion for testing for price inadequacy. Under that improper and *un*constitutional "asset-stripping approach", it was then held that the sale price was proper and that the surcharge claim would be dismissed because "land salvage value" had been realized in the sale.

*Pre-emptively* and *un*constitutionally, the Maryland judicial branch also ruled as a matter of law that the foregoing "asset-stripping approach" or "land salvage value" test for price inadequacy was predicated on the further circumstance that land for residential use and price would be the value *if* the State withheld the annual racing



license and dates from the owner of Pimlico. *It was specifically then held as a matter of judicial overruling of the clear and contrary provisions of the Maryland racing law that such a delicensing of Pimlico had occurred.* In fact under the provisions of the racing law, that was not true. On the contrary, the owner of Pimlico or its agent or buyer had a State-created and a Constitutionally-protected right to operate Pimlico as and for a race track under the State's annual racing license and dates mandated for that race track. But under its improper and *un*constitutional "withheld-license approach", the Maryland judicial branch held in this case that the sale price was proper and that the surcharge claim would be dismissed because "land salvage value" had been realized in the sale and Pimlico was *judicially delicensed.*

Given those obviously *un*constitutional and dare-say fraudulent approaches for *constructively stripping* all of the Pimlico Race Track business assets consisting of *land, plant and earning power* down to "*land salvage value*", the Maryland judicial branch have contrived *a rule of law* used for fact-finding and legal conclusions which in turn has *un*constitutionally deprived the remaindermen of their entrusted property and surcharge rights and recovery and has allowed the trust company to escape surcharge for *the constructively-stripped, but conveyed plant and earning power values* received by the buyer *for no price consideration. In so ruling*, the Maryland judicial branch have raised by their State action and decree in this case the following questions under the due process and equal protection clauses of Section 1, Amendment XIV, of the United States Constitution, to wit:

Question (1).

Whether under the Fourteenth Amendment standard of "full fair market value", this case should be reversed and judgment entered for the remaindermen?

Question (2).

Whether the Maryland judiciary indulged in an unconstitutional "asset-stripping approach" whereby 83% of the Pimlico business assets were discounted or excluded before testing the sale price of $1,115,000 for adequacy, and whether failure to appraise and test at "full fair market value" constituted an unconstitutional "state action" "taking" of property under the Fourteenth Amendment?

Question (3).

Whether the Maryland judiciary indulged in an unconstitutional "withheld-license approach" whereby 83% of the Pimlico business assets were discounted or excluded before testing the sale price of $1,115,000 for adequacy, and whether failure to appraise and test at "full fair market value" constituted an unconstitutional "state action" "taking" of property under the Fourteenth Amendment?

Question (4).

Because of their clear bias toward out-of-state remaindermen and their unconstitutional procedural and substantive handling of this case, whether a fair outcome in this case cannot be expected from the Maryland judiciary, and, accordingly, if this petition is granted and a reversal is ordered, whether this Court should make a specific ruling as to damages in order to assure that due process is met?



## STATUTES INVOLVED

Citations to the positive law provisions involved here are set forth immediately below. The provisions appear verbatim in the Appendix. They may be located through the Index.

United States Constitution of 1787, Amendment XIV, Section 1.

Constitution of Maryland of 1867, Declaration of Rights, Article 8.

Constitution of Maryland of 1867, Declaration of Rights, Article 23.

Constitution of Maryland of 1867, Article III, Section 33.

59 Stat. 568-70 (1945).

26 U.S.C.A. (1947 Supp.) §§13 and 15 (1939).

Flack's Maryland Code Ann., Art. 78B (1939, as amended).

Maryland Session Laws of 1941, ch. 514.

Maryland Session Laws of 1943, ch. 994.

Maryland Session Laws of 1945, chs. 961 and 962.

Maryland Session Laws of 1946 (Spec. Sess.), ch. 3.

Maryland Session Laws of 1947, ch. 502.

Flack's 1947 Cumulative-Supplement-Annotated Code of Maryland, Art. 81, §§224 and 230(b) (1947).

Maryland Code Ann., *Estates and Trusts* §§14-204(d) (1) and (2), 14-210(a) (1), (2) and (5), 14-212, 14-213 and 14-214 (1974).

English Statutes at Large, 21 James 1, ch. XVI.

5 Maryland Code Ann., Art. 57, §10 (1957).

Maryland Code Ann., *Courts and Judicial Proceedings* §5-203 (1973).

3A Maryland Code Ann., Art. 27, §240 (1957).

5A Maryland Code Ann., Art. 48A, §367(a), (b) and (e) (1957).

8A Maryland Code Ann., Art. 93, §§4-404, 12-101 and 12-102(c) (1957).

Maryland Code Ann., *Estates and Trusts* §§4-404, 12-101 and 12-102(a) and (d) (1974).

Bagby's Code of 1911, Art. 46 and Art. 93.

Michigan Session Laws of 1947, No. 107, §§9 and 16.

Baltimore City Council, Ordinance No. 1247, pp. 416, 429-30 (1930-31).

Baltimore City Council, Ordinance No. 1576, pp. 188-89 (1958).

15 C.F.R. Part 240, §§240.10b-3, 240.10b-5 and 240.15cl-2.



## STATEMENT

In addition to the general statement of this case which appears as the preamble to the Questions Presented, the following additional facts should be considered.

**a. General Background—1905 Acquisition of Pimlico Race Track—1913 Introduction of Parimutuel Betting and Track Commission Revenues—1920 Regulation of "On-Track" Racing and Wagering Through Annual Licensing and Racing Dates.**

Pimlico Race Track was first used for horse racing and wagering in 1870.

There was intermittent discontinuation of organized racing and wagering there in the later part of the last Century.

In 1905, Hammond, the creator of the subject trust, bought Pimlico Race Track *in its entirety and as an integrated race track* for the public auction price of $70,000.

At that date, the original 1870 track ownership corporation and the *old* 1870 Maryland Jockey Club, which had held races there *off and on* since the inagural meeting, each conveyed, without reservation whatsoever, *all* that they owned at Pimlico, *i.e.* land, buildings, racing surfaces, fencing, etc., including all appurtenances of any kind thereto pertaining, to the creator of the subject trust in fee simple absolute.

Thus, in 1905, the creator had purchased and owned *the entire race track*, not just the grounds or land, and the

old 1870 Maryland Jockey Club and the original 1870 track ownership corporation had given up everything without reservation.

Three years later, in 1908, the creator changed the existing management at Pimlico by agreeing that *the new Maryland Jockey Club of Baltimore City*, formed in 1905 (the "Jockey Club") would be allowed the use of the race track if it agreed to operate the special assets for a race track and club house as an affirmative duty. There was an annual rental reserved amounting to the lion's share of the then forseeable 1908 profitability.

At this period of 1908, the principal revenue sources were admission fees and a take from what the on-track bookmakers were willing to own up to as their betting profits.[2]

The creator died in 1909.

The respondent Mercantile's predecessor, Safe Deposit and Trust Company of Baltimore, accepted the trust and Pimlico as an original asset.

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[2]This 1908 period preceded *the brand new institution of the parimutuel system*, whereby *the track* (not bookmakers) would take the public bets through the parimutuel windows, *exact a track commission from the total* and pay back the remaining money to the winning bettors at the posted odds in each race.

This new service line did not come to Pimlico until 1913, five years after the initial Hammond-Jockey Club agreement of 1908.

By 1920 legislation, the race tracks obtained a monopoly on the parimutuel gambling by virtue of the *on-track situs* required for it. Prior to 1920, it had been proper for race tracks to conduct the gambling and racing for prizes as a judicially authorized common law right to be discussed hereinbelow.



After taking charge of Pimlico, the trustee made an addition to plant in 1911. It invested $30,000 of other trust capital in acquiring the old club house and land lying directly adjacent to the racing oval near the first bend up from the starting line (the "club house turn").

With $100,000 invested in the race track, the trustee then turned around in the same year and agreed to issue an option for the tenant Jockey Club to purchase Pimlico Race Track for $230,000.

The option expired without being exercised on December 31, 1912.

Thereafter, the revenue explosion of 1913 came when the parimutuel system of betting began at the track and the tenant Jockey Club started commissioning the public betting money which passed through the new betting windows.

But with the new bonanza realized, the trustee did little to equate the management contract terms with the new economics of the race track brought about by the 1913 institution of parimutuel betting and the track's commissions.

Between 1913 and 1947, the trustee merely rolled over the leasing agreements. Four successive management agreements were negotiated *on a private basis and without competitive bidding* between 1913 and 1947. The rental per year to the trust moved thereunder from $15,000 in 1913, to $20,000 in 1919, to $24,000 in 1923, to $28,000 in 1938 and to $30,000 in 1940. Under the fourth and last such management agreement, the terms allowed the trust a $30,000 fixed annual rental and an additional rental equal

to 2½% of the gross receipts in excess of the estimated operating expense figure of $1,200,000.

What had happened under the *private, unappraised agreements,* of course, was that *after the institution of the parimutuel revenue source in 1913,* the trustee had ignored to bring the old lease rental into line with the completely transformed earning power of the race track. *A fortiori, none of the agreements bore any real economic relevance to the underlying values being let out to the tenant Jockey Club,* which thereby was permitted by the trustee to siphon the enormous profits from the trust's capital investment.

For example, in 1913, *even with an improvident lease,* the trust received 61% of the Pimlico profits. But by 1926, the trust was only receiving 8% of the Pimlico earnings—$332,851 going to the tenant. Even the last, much improved agreement with the 2½% equity still lagged behind the economic values involved. Thereunder, in 1946, the year before sale, the trust received merely 7% of the Pimlico earnings and the Jockey Club received 93% or $839,133.

The four pre-existing one-mile Maryland race tracks came under exclusive Statewide general regulation and annual licensing and scheduling provisions in the year 1920. This came about from a desire by the State to regulate the inter-track competition, to prevent new tracks from coming into the market, to assure that the parimutuel betting monies were commissioned and returned to winning bettors without skimming and to foster and improve State revenues through new racing taxes.

The 1920 racing commission *was required by mandate* to issue licenses and racing dates, 100 days in all, to the pre-existing tracks every year prior to March 1st.



This legislative mandate had a twofold purpose. It was for the purpose of promoting public recreation through the exhibiting of horse racing and wagering. It was also for the purpose of turning that activity into a taxed revenue source for the public welfare.

From 1920 to 1946, that taxation scheme reaped $35,304,308 for State and local governments throughout Maryland.

Pimlico produced the largest share, 39% or $14,022,745, by virtue of *its urban location and centrality as a transportation hub with heavy train scheduling from other urban centers.*

This meant that Pimlico outproduced its three competitor tracks by 65% to 133% in raising revenues for the State.

Nevertheless, even though State revenues would have increased dramatically if Pimlico had been allocated more than its quota of 25 racing days, the racing commission followed the declared policy of dividing the 100 authorized racing days equally among the four Maryland one-mile race tracks and thereby recognized each race track owner's right to receive equal treatment as to the annual award of the 100 mandated racing days.[3]

Since Pimlico has always been Maryland's biggest producer track, it has always received the State's license and racing dates and continues to do so today.

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[3]The Fourteenth Amendment equal protection clause has been invoked to compel the Florida racing commission to issue racing dates to track owners. *Hialeah Race Course, Inc. v. Board of Business Regulation,* 270 So.2d 366, 369 (Fla. 1972); *Hialeah Race Course, Inc. v. Gulfstream Park Racing Ass'n,* 245 So.2d 625, 629 (Fla. 1971).

**b. The 1947 Licensing Scheme for One-Mile Race Tracks — General Licensees and Special Locations.**

Anyone opening up the law books to the Maryland scheme for race track regulation on March 21, 1947 would have found that one-mile race track licensing was *by special locations* and *by general licensees*. There was:

(1) *a general class of licensees* who could be licensed by the racing commission to operate each of four special locations within Maryland for the conducting of races and wagering; and

(2) *a special class of race track locations* which had a monoply since 1920 in Maryland, namely Pimlico (founded 1870), Laurel (founded 1911), Havre de Grace (founded 1912) and Bowie (founded 1914).

That licensing scheme in force on the date of the Pimlico sale appeared in para 7 of the Maryland racing law, Article 78B of the Maryland Code Annotated, as follows:

> *"Any person or persons, association or corporation,* desiring to conduct racing within the State of Maryland during any calendar year, shall apply to the Maryland Racing Commission for *a license* so to do.***; *provided, further, that the Commission shall issue no license nor award any dates for racing on any tracks or places for holding races in Maryland, unless on such tracks or places for holding races, races have*



> *been run or held at least once in every year for a period of three consecutive years immediately prior to May 6, 1943 [only Pimlico, Laurel, Havre de Grace and Bowie so qualified]*. The intent and purpose of this proviso being that no new or additional tracks or places for holding races shall be licensed or awarded dates for holding or conducting races." (Md. Sess. L. of 1946 (Spec. Sess.), ch. 3, Sec. 1, para 7) (Emphasis supplied)

On January 7, 1947, two months before sale, the tenant Jockey Club introduced Bill 101 in the Maryland Senate to receive authority to build a brand new, fifth race track somewhere in Maryland, but at a site unidentified and at an estimated, unfunded construction cost of $6 to $8 million.

The language of this Senate Bill 101 as it passed along the legislative route to Senate vote (it also had to be approved by the House and the Governor) *never altered the general licensing provisions of the existing racing law set out above.*

Senate Bill 101 did, however, seek to create an exception to the existing racing law with respect to the licensing-by-location restriction. *Without disturbing Pimlico as a specified location to receive a license,* the Bill sought to create a new, fifth location where the trust's tenant could receive racing days if it ever bought land and erected an adequate racing plant on it.

To make sure of the point, the trustee (quite unnecessarily) introduced its own amendment to the Bill,

Amendment No. 7, which provided that in any event Pimlico would continue as before to have licensed racing and wagering notwithstanding whether or not its tenant became *a new entrant* at its *hypothetical fifth race track*.

Both the trustee's Amendment and the tenant's Bill passed the Senate to third reading. Then, it was announced that Pimlico had been sold to the tenant. At this point, the trustee's proposed Amendment was removed as moot.

In any event, at the date of sale, the Bill and Amendment were not the existing law in force.

Further, neither changed the existing provision for general licensees or the existing provision licensing the Pimlico location. There was no variance from existing law, other than the fifth race track proposal.

Thus under (a) the law in force, (b) the proposed Bill and (c) the Amendment, *under each one*, Pimlico was authorized to receive a license and dates and *"Any person or persons, association or corporation"*, whether the trust, its agent or buyer, could have received that license and those racing dates if Pimlico had been under the applicant's ownership or control.

As the trust's tenant well knew, *the expensive race track plant was the key to receiving a license*, whether it was the Pimlico plant in urban Baltimore or the *hypothetical* fifth race track plant costing $6 to $8 million and never errected.

**c. The Trust's 1947 Pimlico Business Assets—Trade Name, Race Names, Land, Plant and Earning Power—Total Physical and Investment Values of $3,376,278 and $6,779,014 Respectively.**



From 1905 to 1947 or for 42 years, the trust and its creator had owned as a wholly integrated race track business operated under lease *ALL* of Pimlico Race Track, not just the land on which it stood.

In the 1947 sale, the trust owned and conveyed to the tenant Jockey Club (1) the trade name "Pimlico" or "Pimlico Race Track", (2) race names, (3) 90 acres of land, (4) the grandstand with seating capacity for 16,000 patrons, (5) parimutuel building, (6) two club houses, (7) several administration buildings, (8) 26 barns with capacity for 1,050 horses, (9) several kitchens, blacksmith shops and support buildings, (10) a one-mile oval dirt race course with graduated layers for surfacing and drainage, (11) an interior grass race course, (12) underground distribution systems, (13) above-ground distribution systems, (14) patrol booths and course markers, (15) rails, fencing, roads, walkways and outdoor grandstand observation platform, (16) perimeter fencing and landscaping, (17) a racing fund for improvements with a balance of $373,155 and future annual receipts of ½ of 1% of the parimutuel monies, and (18) two gas station sites.[4]

At sale date in 1947, all of this was under lease to the Jockey Club *at nominal rental* and under terms that the tenant was to act each year under the State's racing license as the trust's *agent for racing*, to wit:

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[4]Please refer to the photographs of the Pimlico plant taken ten days before the sale which are set forth at the very back of this Petition.

"That said Lessee [the tenant Jockey Club] hereby *covenants. . . that it will do* or have done at its own expense *all things necessary to comply with,* observe, perform and abide by *all the laws* and ordinances *of the State of Maryland* and City of Baltimore now in force or that may be and become in force during the term of this demise *in respect to said premises.*

* * *

That said Lessee [the tenant Jockey Club] further covenants . . .*that it will use said demised premises for the purpose of conducting a race track and clubhouse in connection therewith* and will not use or permit said premises or any part thereof to be used for any other purposes except those appurtenant to or customarily connected with or incident to *the operation of such race track and clubhouse.*" (Emphasis supplied)

The trade names were protected trust assets, including the names of races with "Pimlico" in them, to wit:

"The name 'Pimlico Race Track' or 'Pimlico' being appurtenant to the premises hereby demised, said Lessee [the tenant Jockey Club] hereby covenants not to designate said demised premises by any other name; it being further distinctly understood that nothing herein contained shall be construed as conferring any rights upon said Lessee to appropriate said name or use it in connection with any other race track at any time."



The pre-1905 race names associated in the public mind with and appurtenant to Pimlico were conveyed absolutely to the creator of the trust in 1905 by the original 1870 track ownership corporation and the *old* 1870 Maryland Jockey Club in and by the 1905 deed to Pimlico and the appurtenances clause thereof, to wit:

"all the right, title, interest and estate. . . (of the grantors in and to the deeded property)

. . .

TOGETHER with the improvements thereon, and the rights, ways, waters, water courses, priveleges and appurtenances thereto belonging or appertaining."

The 1908-and-after race names associated in the public mind with and appurtenant to Pimlico were the property of the trust under the "race track integration clause" put in each of the four successive management agreements which the trustee made with the tenant Jockey Club.

The last "race track integration clause" provided for the return and surrender of the entire race track including the additional race names as follows:

"Said Lessee [the agent-tenant Jockey Club] covenants to keep all of the buidlings, stands, track, fences and other improvements, as well as all other items covered by this demise, in good order and repair during the continuance of the term of this lease, at its own expense, and upon the expiration thereof to surrender the peaceful and quiet possession of the same, without

previous notice of any kind or character, in good condition, including all property mentioned in said schedule attached to said agreement of July 19, 1916, it being distinctly understood and agreed that all necessary repairs and all additions, alterations and improvements to the demised premises are to be made at the expense of the said Maryland Jockey Club of Baltimore City, unless expressly otherwise hereby provided, and that upon the surrender and termination of this lease all improvements, additions or alterations that may have been made to said demised premises shall remain upon said demised premises and shall become absolutely and unconditionally the property of the said Safe Deposit and Trust Company of Baltimore, Trustee as aforesaid, without compensation to said Lessee."

This last lease arrangement did not contain a renewal clause and was to expire on May 31, 1949.

Because of the sale on March 21, 1947, it was agreed as a condition of sale that the lease would be deemed cancelled.

Therefore, until the eviction date of May 31, 1949, the agent-tenant Jockey Club was under affirmative duty to manage Pimlico under the trust's trade name as and for a race track and clubhouse. At May 31, 1949, the trust had the absolute right to take back the race track in its entirety without lease encumbrance and to operate the track itself or to install new management. There was no covenant not to compete. At May 31, 1949, the Jockey Club was out of a race track and out of the racing business at Pimlico.



During the lease, the trust also had the right to sell the race track to anyone.

The Pimlico physical plant had a replacement value less depreciation of $3,376,278, which on March 21, 1947, the trustee sold to the tenant Jockey Club for $1,115,000. The $3,376,278 consisted of the following:

**Pimlico Physical Value At March 21, 1947**

| | | |
|---|---|---|
| Land — 90 acres | | $1,138,500 |
| Buildings and improvements | $2,805,843 | |
| less depreciation | (1,066,220) | 1,739,623 |
| Gas station subleases | | 125,000 |
| Racing Fund for improvements[5] | | 373,155 |
| **Pimlico Physical Fair Market Value** | | **$3,376,278** |

The Pimlico physical values of $3,376,278 had a demonstrated earning power of $644,393 each year. On

[5]The trustee itself had failed to maintain a depreciation reserve out of track earnings. This omission was actionable breach of duty and self-admittedly wasted the trust to the amount of $620,400 unfunded depreciation.

The racing fund mentioned above as on hand was established by the racing commission itself to provide for plant renewal under a 1944 ruling which allowed then and for the future an annual take of ½ of 1% from the parimutuel monies to be escrowed with it and dispersed by it for improvements. This "Racing Fund" was ratified and confirmed by the legislature in 1945. Md. Sess. L. of 1945, chs. 961 and 962; Md. Sess. L. of 1947, ch. 502, para 11A. Refer to the Appendix, pages 135a, 138a and 150a, *infra* with reference to para 11A.

March 21, 1947, the trustee sole that $644,393 annual earning power to the tenant Jockey Club for $1,115,000. The 5-year breakdown was as follows:

**Pimlico Net Earnings at March 21, 1947**

| Year | As A Proprietorship— Net After All Expenses, Including Employee-Director Compensation |
|---|---|
| 1942 | $357,551 |
| 1943 | 542,338 |
| 1944 | 630,642 |
| 1945 | 783,959 |
| 1946 | 907,475 |
| **1942-46 Average** | **$644,393** |

Capitalized for investment value at the rate of return shown by comparison to four similar, but lesser-quality race track companies at the date of sale, *i.e.* the ratio of their earnings to their stock prices, Pimlico had the following value, to wit:

**Pimlico Investment Value At March 21, 1947**

| | |
|---|---|
| Pimlico as a proprietorship at the 9.50% rate of return shown for the comparable companies | **$6,779,014** |
| Pimlico as a corporation at the 8% rate of return shown for the comparable companies | **$4,911,629.** |



**d. The Trust's Delegated Management—The Jockey Club's 1908-47 Contribution of $200,000 in the Form of Its Management Organization and Cash—Caretaker Function—Fully Qualified Rotating Lower Management Moving Seasonally Among the Race Tracks in the Eastern Racing Circuit.**

During this period, the Eastern Racing Circuit consisted of expert, itinerant race track men, such as the racing secretary, handicapper, parimutuel clerks, jockeys, stable hands, etc., who not unlike a traveling circus would migrate north and south following the opening of the racing schedule at each track. Thus, there was rotating management at the tracks, in the winter in Florida, in the summer in the Northeastern states and in the early spring and fall in Maryland.

The function then of the trust's 1908-47 agent-tenant Jockey Club was essentially that of a caretaker, plus in later years a publicity and scheduling function. The real management function was performed by the expert itinerants under the watchful eye of the Maryland racing commission, which had the final say on everything.

All management at all levels was bargained for and compensated at pay scales approved by the racing commission.

The foregoing profit figures were *net* after subtraction of that cost of management and directors' fees.

The agent-tenant Jockey Club did make two necessary *capital contributions* to Pimlico from its resources. Neither was unique. These were:

**Agent-Tenant Jockey Club Capital Contribution**

| | |
|---|---|
| a) organizational value of management | $100,000 |
| b) minimum cash requirements for operation during year (parimutuel bankroll is assumed financed by day notes as was the practice) | $100,000 |
| Agent-Tenant Pimlico Capital | $200,000 |

The 1908-47 agent-tenant Jockey Club was essentially *a shell corporation,* with only $200,000 invested in Pimlico operations, stated capital of $454,000, surplus of $817,149 and a net worth of $1,542,149 as of its fiscal year ending in 1946.

In the words of its president, if the undercapitalized Jockey Club had not been able to lease or buy Pimlico, it would have had to "Give up racing" or erect a new track elsewhere. Its public relations officer further added that the money to erect a new track was "beyond the means of anybody there" and Mr. Alfred G. Vanderbilt, the principal stockholder was not to be approached on the subject. The chairman of the racing commission stated under oath that contrary to publicity at the time of sale, those in control of the agent-tenant "had no intention whatsoever ever to move."

The most recently constructed race track plant was Monmouth Park in New Jersey. In the early 1940's, it cost $5,200,813 to build Monmouth, exclusive of $49,430 for



land. It came in before the heavy inflation in construction costs experienced in 1946-47.

A new Maryland race track would have cost $6 to $8 million.

**e. Analysis of the Rate of Return on the Respective Pimlico Capital Contributions by the Trust and by the Tenant Jockey Club—The 1913-47 Management Contract Siphoning by the Jockey Club of the Enormous Parimutuel Profits.**

It has already been mentioned above how the trustee had failed after the institution of parimutuel betting at Pimlico in 1913 to keep the management agreements apace so that the trust would have the benefit of that new, lucrative revenue source.

To give some idea of how bad the siphoning under the management agreements had become, we focus here on the 5-year period 1942-46 preceding the sale.

For 1942-46, the corrupt management contract in force allowed the Jockey Club to siphon the parimutuel profits as follows:

| Year | Trust's Share and Percentage | | Jockey Club Agent-Tenant's Share and Percentage | | Pimlico Total Profit |
|---|---|---|---|---|---|
| 1942 | $ 37,741 | 10% | $ 319,810 | 90% | $ 357,551 |
| 1943 | 77,909 | 14% | 464,429 | 86% | 542,338 |
| 1944 | 104,044 | 16% | 526,598 | 84% | 630,642 |
| 1945 | 96,296 | 12% | 687,663 | 88% | 783,959 |
| 1946 | 68,342 | 07% | 839,133 | 93% | 907,475 |
| **1942-46 Average** | **$ 76,866** | **12%** | **$ 567,527** | **88%** | **$ 644,393** |

At the eve of sale in 1947, the trustee's damaging siphoning arrangement with the agent-tenant amounted to a fraud whereby the following pertained:

| | Trust-Owner | Jockey Club Agent-Tenant |
|---|---|---|
| **Capital Invested[6]** | **$ 3,376,278** | **$ 200,000** |
| **1942-46 Average Profit** | **$ 76,866** | **$ 567,527** |
| **Share of 1942-46 Average Profit** | **12%** | **88%** |
| **Rate of Return on Invested Capital** | **2%** | **283%.** |

### f. How the Trustee Covered Up the 1913-47 Management Contract Siphoning and Built its 1947 Offering Price of $1,540,000 Around It—The Trustee's $55,000 Ground Rent Value and Exclusion of $1.4 to $2.4 Million of Physical Assets from Valuation.

When it came time for the trustee to sell Pimlico to the tenant Jockey Club, the history of the siphoning led to the need for cover-up.

Then, too, there was the problem that the Jockey Club was *underfinanced* in the sense that *it did not have the capital to pay a fair price for the race track* at an earning power of $644,393 and a capitalized value of $6.6 to $4.7 million.

[6]Based on tangible physical value, not intangible investment value.



Nor did the Jockey Club have enough capital to buy the race track at its lower physical value of $3,376,278.

All the Jockey Club had was the retained profits which it had siphoned in the past years. This amounted to $1,542,149 net worth at the end of 1946.

Normally, the trustee would not have even bothered negotiating with the Jockey Club because it did not have enough money.

But this was not a normal situation.

Conflicts of interest surrounded the sale. If the countervailing interests were to be assuaged, the trust company would have to deal *exclusively with the Jockey Club* and with no one else and would have *to arrange for a low price* which the undercapitalized Jockey Club could meet without raising new capital.[7]

What the trustee did in selling Pimlico for the trust account exactly conformed with those countervailing dictates.

The sale was private and the price was rigged.

### Valuation Rigging

The trustee made an abortive attempt to have Philadelphia engineers Day & Zimmermann give an

[7]The trust company and its directors owned or controlled and were responsible for *30.32% of the outstanding stock of the Jockey Club.*

In addition to the *30.32% stock position*, they also had *lucrative business ties with and revenues from the Jockey Club.*

opinion as to Pimlico's physical value which would be scaled down from their own internal administration figures for land and improvements based on accepted insurance and assessment figures of $2,833,861 to $3,057,200.

However, the engineers protected themselves by finally opining that the Pimlico land and plant were worth $2,540,000 to $3,540,000 subject to presumed accuracy of the land value furnished to them by the trustee of $540,000 for alternative residential use.

At this point, the trustee decided that earnings were controlling rather than the $2,540,000 to $3,540,000 physical valuation of the engineers.

A normal race track earnings capitalization was rejected. That would have led to an overall price which the Jockey Club could not afford. It would have also exposed to question the incredibly low income stream to the trust which had corruptly evolved from the siphoning management contracts and the failure to capture the 1913-and-after parimutuel revenues at the track.

Accordingly, the trustee's men decided to turn the siphoning into the measure of capitalization of earnings by estimating the annual rental under the management contract at $55,000 *per annum* and projecting that for the future by capitalizing it at the current interest rate of 3½% per annum or a price-to-earnings multiplier of 28 times $55,000. This gave a value similar to a ground rental capitalization of $1,571,428 for the entire race track in fee simple.



The fabrication was obviously incorrect. The fee simple earnings were $644,393, not $55,000. Further, as to basic approach, they were selling the race track in fee not just the lease or management contract. The fraudulent income stream under the management contract which had been subject to the siphoning since 1913 was irrelevant to the value and earnings of the race track proper and was an inadequate income stream for a lease anyway because of the siphoning. But this number juggling and hybrid appraisal approach served the trustee's purposes of covering up the omission of the enormous parimutuel revenue and of devising a token price which the Jockey Club could afford.

After concocting the $1,571,428 earnings-oriented figure, the trustee's men then compared that with *a component figure* of $1,540,000 found in *an excerpt* from the Philadelphia engineers' report (ignoring the conclusion of $2,540,000 to $3,540,000) and through the process of mischaracterization and excerpting arrived at their asking price of $1,540,000.

### Closed Sale Negotiations

With a token price of $1,540,000, it was mandatory that the trustee negotiate in privacy with the insider Jockey Club.

Open competitive bidding would have exposed the faulty asking price for what it was — a setup to raid the trust.

Accordingly, a policy was adopted by the trustee not to offer the race track publicly, but to place it privately with the Jockey Club.

With smug arrogance, the trustee's men declined to open the race track up to public solicitation of offers to buy, brokering or newspaper advertising.

The trustee secreted the fact that Pimlico was for sale.

Oddly, a local man, Hoffman, probably a "show" purchaser and an insider, had his lawyer dicker with the trustee in the month before sale.

Hoffman offered $1,500,000 without a guarantee. The trustee countered with a lowered price of $1,300,000 on condition that $100,000 be personally guaranteed and that it be signed up in 48 hours. The Hoffman negotiations broke off.

The trustee then used those negotiations as an excuse for lowering the asking price to the Jockey Club to $1,300,000.

So matters stood when on March 14th and seven days before sale to the Jockey Club for $1,115,000, the trustee's president let slip in public hearings that Hoffman had offered $1,500,000.

This was reported widely in the two Baltimore newspapers on the same day.

Two uninvited, outside purchasers immediately appeared by the 19th of March to compete for the race track and were joined by still a third bidder two days after that.

The trustee ignored these bidders. It hurriedly closed with the insider Jockey Club two days later on March 21, 1947 at $1,115,000.



The trustee had no exemption from full trust duties. It was obliged to seek out and realize the highest and best price anywhere obtainable.

The trust continued on to its 1972 termination date without any disclosure of the breach of trust.

**g. Summary of the Proper Pimlico Race Track Valuation of $3,376,278 Physical Value to $6,579,014 Investment Value and the Compounded Surcharge Damages to Date of $37 to $54 Million—Comparison of the Trustee's Faulty Valuation Defense—Statement of How the Maryland Judiciary Fashioned the Law to Relieve the Trust Company of Liability.**

At the time in 1946-47 when it was put to covering up the fraudulent management contract siphoning of the parimutuel revenues which dated back to 1913 and also put to devising a 1947 sale price which the undercaptalized Jockey Club could afford out of the siphoned earnings of the track, the trustee studiously avoided the proper race track sale valuation discussed above, namely:

**(1) Proper Pimlico Valuation and Surcharge Damages**

| | As a Proprietorship | As a Corporation |
|---|---|---|
| **Pimlico Physical Value** | **$ 3,376,278** | **$ 3,376,278** |
| **Pimlico Investment Value** | **6,779,014** | **4,911,629** |
| **Less $200,000 contributed by agent-tenant** | **(200,000)** | **(200,000)** |
| **Pimlico Saleable Value 3/21/47** | **$ 6,579,014** | **$ 4,711,629.** |

The missing $620,400 depreciation reserve is to be added.

Since the trustee held and sold Pimlico as a proprietorship and not as a corporation, the higher tier of value is applicable.[8]

The consequential damages compounded mount to $37,485,095 to $54,084,248 inclusive of the initial capital loss.[9]

The consequential damages are that substantial for the reason that this 70-year old trust was deprived of the 1905-47 capital appreciation of the race track because of the raid and sale price inadequacy in 1947. Since 1947, that missing capital has been denied investment for appreciation to offset inflationary devaluation of the 1947 dollars. In addition to the missing appreciation and missing capital, 31 years of income is missing.

**(2) Improper Trustee Pimlico Valuation**

Instead of **(1)**, the trustee devised the following theorem for misvaluation in 1947 and has defended it, to wit:

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[8]The trustee purchased liability insurance for Pimlico rather than incorporate and thereby avoided the 38% corporate tax rate. The Jockey Club got the benefit of the depreciation deductions for income tax purposes rather than the trust.

[9]Proprietorship-form damages compounded are $54,084,248 through 1978. Corporate-form damages compounded are $37,485,095 through 1978. Other consequential damages involve allowances and disallowances pertaining to attorneys' fees and expenses, court costs, trustee commissions and allowances and avoidable tax impacts arising out of the breach of trust and its continuation to date.



*Mercantile Theorem:* If A dies seized of the proprietorship Blackacre, having the foregoing $6,579,014 investment value, $3,376,278 physical value and $644,393 annual earning power, and if under A's will Blackacre is left in trust with T for the benefit of certain beneficiaries interested in income and principal, respectively, and if under the will A confers on T the power to lease and the power to sell Blackacre, it is proper for T to deal with Blackacre under either approach (1) or approach (2) below and the beneficiaries have no cause of action against T if T adopts approach (2) rather than approach (1), namely:

(1) T may properly sell Blackacre for its highest value of $6,579,014; or

(2) T may lease Blackacre to its friend F on terms that the trust will receive annually 9% of Backacre's earning power or $55,000 and F will receive 91% or $589,393; and then T may sell Blackacre to F by capitalizing the 9% rental stream or $55,000 annually at the current 3½% interest rate for a purchase price to F of $1,571,428.

*A fortiori,* the fact that a difference in capital value between approach (1) and approach (2) of $5,007,586 occurs is not actionable waste or siphoning or a kickback fund.

Further, it is proper to negotiate privately without competive bidding and to drop the price to F from $1,571,428 to $1,115,000 for a difference between approach (1) and (2) of $5,464,014.

Finally, at the price of $1,115,000 relative to the earning power sold of $644,393, it is proper that Pimlico is being picked up by the Jockey Club at a price-to-earnings ratio of 1.7 or at an equivalent rate of return on the Jockey Club's $1,115,000 investment of 57.80% annually.[10]

**(3) Improper Maryland Judicial Pimlico Valuation:**

Instead of **(1)** and **(2)**, the Maryland judiciary have parlously held as follows:

---

[10]How this compared with legitimate investment alternatives is worth considering.

For the same period of earnings performance 1942–46, the Dow Jones Industrials were priced at the end of the period to yield a rate of return of 3.81% on dividend payout and 6.01% on full earnings.

The trustee's selected rate of return for sale of Pimlico of 57.80% was grossly out of line.

At earnings of $644,393 and a price of $1,115,000, the trustee was selling Pimlico to the tenant Jockey Club at a rate of return which meant that the buyer was getting 861% more earnings per invested dollar and 1,417% more declarable dividends than it could realize by alternatively investing in the Dow Jones Industrials.

Of course, to put this in perspective, the proper market capitalization rate of return for race track investment valuation at this period was 8% to 9.50% as discussed above.

This was generally a period of low yield on invested capital as evidenced by the alternative market for debt where yields of merely 1½% to 2½% *per annum* were the rates of return respectively for U.S. Treasury Bills and Triple-A corporate indebtedness.

This meant that at the time an investment of $1,000,000 would have returned annually to the investor:

(a) For the Dow Jones Industrials, $38,100 dividends and $60,100 earnings;
(b) For a race track, $80,000 to $95,000 earnings;
(c) For U.S. Treasury Bills and Triple-A corporate indebtedness, respectively, $15,000 to $25,000 *per annum*.



(1) the Pimlico Race Track should only be valued as to the land component and the other assets are not to enter into the valuation; and

(2) the land is not a regulated-licensed asset and therefore has a market value for alternative residential use, but all other assets which the trust owned and had committed to race track use, including the earnings of the race track, were as a matter of law unlicensable, inoperative and without value, even if sold with the land and available to the buyer.

**h. Constitutional Grounds Timely Raised Below:**

As for procedure in this litigation and the constitutional grounds raised, between June 1973 and August 1976, the trial of this case took place in two phases.

In 1973, the trial judge, D. Ross, dismissed the remaindermen's surcharge claim after they had presented evidence and before the trustee came forward with its evidence.

On appeal, the Court of Special Appeals of Maryland reversed the trial dismissal and remanded for further proceedings.

The opinion of the Court of Special Appeals of June 12, 1975 reversing the trial judge's dismissal, together with the related mandate, appear in the Appendix at pages 67a and 101a.

The trial judge's oral opinion of June 27, 1973 and the related final order and decree of May 23, 1974 (so reversed) appear in the Appendix at pages 103a and 114a.

On the remand, the same trial judge, D. Ross, took

over the case again even though he had already been reversed, was not the then appointed judge charged to sit in that court and had never been appointed a protracted-case judge to stay with the case to conclusion.

In the second trial, there was a reopening of the remaindermen's case in chief in order to allow the introduction of new, additional valuation evidence and expert testimony.[11]

The remaindermen put in the additional evidence and testimony and rested.

The trustee put on its evidence and witnesses and rested.

D. Ross, J., again decided to dismiss the remaindermen's surcharge claim.

His second oral opinion of August 6, 1976 and related final order and decree of September 14, 1976 sought to be reviewed here appear in the Appendix at pages 44a and 64a.

The trial judge refused to await the filing of the remaindermen's trial brief.

Instead of taking the brief, which also by incorporation formed an integral part of the remaindermen's closing

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[11] *The reopening* was necessary because the trial judge had forced the case to trial the first time in 1973 on a schedule whereby the remaindermen's local trial counsel had made their first appearance on April 10, 1973 and were ordered over protest to proceed to trial on the merits by June 4, 1973. This meant that said remaindermen's trial counsel were only given 38 business days for discovery and preparation of experts and the trial itself. Their special motion to be allowed more time had been denied.



trial statement, D. Ross, J., issued his oral opinion of August 6, 1976 three days after the closing statement and twenty-five days before the remaindermen's brief could have been readied for filing on the promised date of August 31, 1976.

On August 31, 1976, the remaindermen's brief setting forth the merits and constitutional grounds for recovery was filed as part of a motion for reconsideration.

The trial judge denied the motion for reconsideration which incorporated the brief in its entirety.

This occurred on September 14, 1976 in open court just before he signed the final order and decree under review.

In a further written order of October 4, 1976, he made the same disposition of the motion for reconsideration and confirmed his earlier oral ruling.

Thus, at trial level, despite obvious obstruction by D. Ross, J., the remaindermen raised timely and directly the constitutional grounds in their closing trial statement, in their filed brief and in their motion for reconsideration.

The trial court was given opportunity to consider the constitutional grounds and denied them.

On appeal to the Court of Special Appeals of Maryland, the same constitutional grounds were again presented in brief form.

However, after four successive motions on the subject, the Court of Special Appeals likewise tried to avoid considering the constitutional grounds by declining to receive for filing the remaindermen's proffered brief on appeal. This had the intended effect of excising the

remaindermen's presentation. When the remaindermen again presented the same excised points in their reply briefs on appeal, the Court of Special Appeals then ruled that it was unfair to the other side to consider the points.[12]

[12]This suppressive action in nullifying the remaindermen's briefing was challenged as *un*constitutional under the due process clause.

But the Federal ground for a full and fair opportunity to be heard on the substantive and constitutional grounds through a consideration of the proffered appellate briefing was itself denied when the Court of Special Appeals *en banc* refused to file the motion papers and so covered up by leaving the proceedings *dehors* the record.

Briefing and moving papers now *dehors* the record by reason of the refusal of the Court of Special Appeals to file them can be furnished by affidavit if necessary.

The pretext for refusing appellate briefing was a page-limitation order commanding the remaindermen to file a 175-page brief rather than a 300-page brief.

Relative to the record extract in this case, the chief judge commanded that the brief of 175 pages had to be 2.7% as long as the record or 1 brief page for 36 record pages, whereas the remaindermen required and were asking for acceptance of a brief which was 4.7% as long as the record or 1 brief page for 21 record pages.

Most records in that court in far less sophisticated cases than this one are about 200 record pages and the standard rule for briefing allows 50 brief pages. Thus, in the standard case, it is expected that the brief shall be 25% as long as the record or 1 brief page for 4 record pages.

It is clear that in denying the remaindermen's proffered brief of 300 pages, the chief judge was acting most deliberately in trying to suppress this case, particularly when the need to file that length of brief was put before him four successive times and the printed 300-page brief and 29 copies were actually proffered for filing as an attachment to one of the applications for permission to file it. The chief judge ordered the clerk to impound the proffered 300-page brief in the court safe and not to distribute it.

It is astonishing to reflect on the pattern that both the trial judge and the chief judge of the appellate court wanted to avoid receiving briefing from the remaindermen in order to force them to waive their case. See *Gai Audio of New York v. C.B.S.*, 27 Md. App. 172, 183, 340 A.2d 736, 743 (1975) (holding non-briefing constitutes waiver of claim).



After denial of briefing, the Court of Special Appeals affirmed the trial court's dismissal of the remaindermen's surcharge claim by its opinion of March 7, 1979, which appears in the Appendix at page 2a.

A motion for reconsideration, including all constitutional grounds, was filed and denied.

On April 26, 1979, a petition for writ of certiorari and full review, including the constitutional grounds and the suppressed briefing point, was filed with the high court, the Court of Appeals of Maryland.

On June 6, 1979, the Court of Appeals entered its order denying the petition for full review of the merits and constitutional points. There was no decision other than the recital of the order itself, which appears in the Appendix at page 1a.[13]

This Peition has been filed in light of that record and should be granted for the reasons now considered.

## REASONS FOR GRANTING THIS WRIT

**Point (1).**

**Under The Fourteenth Amendment Standard Of "Full Fair Market Value", This Case Should Be Reversed And Judgment Should Be Entered For The Remaindermen.**

The Law applicable here flows from the due process and equal protection clauses of the Fourteenth Amendment, Section 1, the United States Constitution as follows:

[13]Pursuant to this Court's Rule 23(1)(f) requirement, appropriate record excerpts relating to the raising of the constitutional grounds for review are set forth in the Appendix beginning at page 177a.

> "nor shall any State deprive any person of . . . property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

In *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 313 (1950), the Court held that the due process clause protects *entrusted property and right of surcharge* where a bank brings *state court proceedings* to have itself judicially discharged from liability to trust beneficiaries.

*In Re Appeal No. 769 September Term, 1974 From Circuit Court of Baltimore City*, 25 Md. App. 565, 566–67, 335 A.2d 204, 206 (1975), Maryland itself has acknowledged that *the adjudication* of *property rights* by *the very same Maryland courts involved in this case* constitutes "State action" regulated under the Fourteenth Amendment.

The requisite "State action" and "property" subjects are present here.

In this case, the State action involves what Maryland judicial branch rule of decision shall properly under the Fourteenth Amendment govern, that is Maryland's "land salvage value" standard or this Court's "full fair market value" and "highest and best use" standard.

The property to which the Maryland judicial branch "State action" relates, of course, is the entrusted property and the remaindermen's right of surcharge and recovery.

For the reasons discussed below, the substantive standards of due process and equal protection compel reversal of the judicial decree below and entry of judgment for the remaindermen.



**Point (2).**

**The Maryland Judiciary Indulged In An Unconstitutional "Asset-Stripping Approach" Whereby 83% Of The Pimlico Business Assets Were Discounted Or Excluded Before Testing The Sale Price Of $1,115,000 For Adequacy; Failure To Appraise And Test At "Full Fair Market Value" Constituted An Unconstitutional "State Action" "Taking" Of Property Under The Fourteenth Amendment.**

Under the Fourteenth Amendment due process clause it has long been the Law that arbitrary and confiscatory use of State power is prohibited.

A major corollary is the prohibition against "*public* power for *private* use or confiscation". *E.g., Thompson v. Consolidated Gas Co.*, 300 U.S. 55, 80 (1937); *Schechter Corp. v. United States*, 295 U.S. 495, 537 (1935); *Missouri Pacific Rwy. v. Nebraska*, 164 U.S. 403, 417 (1896); *Bruce v. Dir., Chesapeake Bay Aff.*, 261 Md. 585, 606–07, 276 A.2d 200, 211 (1971); *Easter v. Dundalk Holding Co.*, 199 Md. 303, 86 A.2d 404 (1952); *Benner v. Tibbitt*, 190 Md. 6, 20, 57 A.2d 346, 353 (1948); *Dasch v. Jackson*, 170 Md. 251, 252, 264–70, 183 Atl. 534, 539–42 (1936); *Goldman v. Crowther*, 147 Md. 282, 306–08, 312, 128 Atl. 50, 59, 61 (1925); *Mayor of Baltimore v. Radecke*, 49 Md. 217 (1878).

In *Thompson, supra* at 80, the Court held:

> ". . . this Court has many times warned that one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid."

In *Missouri Pacific Rwy., supra* at 417, the Court held:

> "This court . . . is unanimously of opinion, that the order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners, for the purpose of building and maintaining their elevator upon it, was, in essence and effect, a taking of private property of the railroad corporation, for the private use of the petitioners. The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States."

In *Benner v. Tibbitt, supra* at 20, 353, Maryland itself has held:

> "But in restricting individual rights by exercise of the police power neither a municipal corporation nor the state legislature itself can deprive an individual of property rights by a plebiscite of neighbors or for their benefit. Such action is arbitrary and unlawful, *i.e.*, contrary to Art. 23 of the Declaration of Rights [Maryland's "due process" clause] and beyond the delegated power of the town of Denton to pass reasonable ordinances.*** There is no magic in the word 'zoning', but there is a wide difference between exercise of the police power in accordance with a comprehensive zoning plan, which imposes mutual restrictions and confers mutual benefits



> on property owners, and arbitrary permission to A and prohibition to B to use their own property, at the pleasure of neighbors or at the whim of legislative or administrative agencies."

On the facts in this case, the clear issue up is whether Maryland judges are required by due process to refrain from arbitrariness and confiscation for the benefit of Maryland insiders and are affirmatively required to value and test for price inadequacy and trustee surcharge every fiduciary sale at the Constitutionally required standard of "full fair market value" for all assets sold, tangible and intangible.

The Constitutional standard for valuation is set forth in the leading condemnation case of *United States v. Miller*, 317 U.S. 369 (1942). The Court held:

> "The Fifth Amendment of the Constitution provides that private property shall not be taken for public use without *just compensation*. Such compensation means *the full and perfect equivalent* in money of *the property taken*.***
>
> ****In an effort, however, to find some practical standard, the courts early adopted, and have retained, the concept of market value.* *** The term 'fair' hardly adds anything to the phrase 'market value,' which denotes what 'it fairly may be believed that a purchaser in fair market conditions would have given,' *New York v. Sage*, 239 U.S. 57, 61, or, more concisely, 'market value fairly determined.' *Olson v. United States*, 292 U.S. 246, 255.

Respondents correctly say *that value is to be ascertained as of the date of taking.* ***

* * *

The respondents also say that, whatever *the criterion of value* adopted by the federal courts, Congress has adopted the local rule followed in the state where the federal court sits. . . . We need not determine what is the local law, for the federal statutes upon which reliance is placed require only that, in condemnation proceedings, a federal court shall adopt the forms and methods of procedure afforded by the law of the State in which the court sits. They do not, and could not, affect *questions of substantive right—such as the measure of compensation—grounded upon the Constitution of the United States.* ***" (*Miller* at pages 373–74, 379–380) (Emphasis supplied)[14]

In another condemnation case, *United States v. Chandler-Dunbar Co.*, 229 U.S. 53, 80–81 (1913), the Court also held:

"But in a condemnation proceeding, the value of the property to the Government for its particular use is not a criterion. The owner must be compensated for what is taken from him, but

[14]The Fifth Amendment condemnation standard is binding on the States through the Fourteenth Amendment due process clause and the two standards are coextensive. *E.g., Chicago B. & Q. R. R. v. City of Chicago*, 166 U.S. 226, 236 (1897); *Foster v. City of Detroit, Michigan*, 254 F. Supp. 655, 661 (E.D. Mich. 1966).



that is done when he is paid *its fair market value for all available uses and purposes.* ***" (Emphasis added)

In *Miller, supra* at 373–74, the Court said: "It is conceivable that an owner's indemnity should be measured in various ways depending upon the circumstances of each case and that no general formula should be used for the purpose."

In *Standard Oil Co. of New Jersey v. Southern Pacific Co.*, 268 U.S. 146 (1925), the Court considered valuation in connection with an award for loss of a vessel. The Court adopted the first of two possible *appraisal* methods, namely *the reproduction cost less depreciation method.* The Court said:

"It is fundamental in the law of damages that the injured party is entitled to compensation for the loss sustained. Where property is destroyed by wrongful act, the owner is entitled to its money equivalent, and thereby to be put in as good position pecuniarily as if his property had not been destroyed. In case of total loss of a vessel, the measure of damages is its market value, if it has a market value, at the time of destruction. The Baltimore, 8 Wall. 377, 385. . . . Where there is no market value, such as is established by contemporaneous sales of like property in the way of ordinary business, as in the case of merchandise bought and sold in the market, other evidence is resorted to. The value of the vessel lost properly may be taken to be the sum which, considering all the circumstances, probably could have been obtained for her on the

date of collision; that is, the sum that in all probability would result from fair negotiations between an owner willing to sell and a purchaser desiring to buy. *** *And by numerous decisions of this court it is firmly established that the cost of reproduction as of the date of valuation constitutes evidence properly to be considered in the ascertainment of value.* *** *It is to be borne in mind that value is the thing to be found, and that neither cost of reproduction new, nor that less depreciation, is the measure or the sole guide.* ***" (At pages 155–56) (Emphasis supplied)

In *United States v. 564.54 Acres of Land, Etc., Pa.*, 506 F.2d 796, 799 (3rd Cir. 1974), *cert. granted*, 58 L.Ed.2d 649 (1978), the court was considering the condemnation of *a special purpose property* and noted where such a property or facility is used for profit, the second of two possible *appraisal* methods, namely *the capitalization of earnings or investment value approach*, would be used. The court said:

> "If the government condemns property for which there is a ready market (commodities are a classic example) payment of the fair market value is complete indemnity since, whatever its intended use, the condemnee can readily replace it in the marketplace. Some property, however, from its very nature, has no marketplace. An example is *a single purpose facility* requiring a large capital investment, such as a power generating station. Such facilities are usually operated for profit. When they cannot be valued in the marketplace *a fair measure of the government's obligation to indemnify may be the*



> *present value of capitalized future earnings. Presumably the investors in a single purpose facility operated for profit will be able to take their capital investment, valued on the basis of the capitalized earning capacity of the facility in which they invested, and put it to another use.* ***" (At page 799) (Emphasis added)

Also see, *Northern Acceptance Trust 1065 v. AMFAC, Inc.*, 59 F.R.D. 116, 122–29 (Haw. 1973) (special purpose sugar plantations and equipment valued at capitalized earnings).

In *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949), the Court adopted the capitalization of earnings method for according full fair market value, tangible and intangible, in connection with government condemnation of a laundry business consisting of land, plant and going concern value. The Court held that if in fact on remand it could be demonstrated that the earnings of the physical plant capitalized at the proper rate of return exceeded in overall value the reproduction cost of the physical plant generating those earnings that the condemnation award had to include the excess or higher intangible value shown by a capitalization of earnings appraisal. This followed because the government had taken *the entire business* and that standard reflected *all value and the highest value of the tangible and intangible business assets* seized. The Court was careful to note that the value of existing or substitute management was not taken and that the earnings capitalization would reflect this necessary exclusion presumably since the Court must have been aware that management was not constitutionally saleable as such and as a cost of operation of the business had already been paid and accounted for by bargained-for

salaries which in turn had been deducted from business revenues in arriving at the *net earnings* to be capitalized. The Court held:

> "The market value of land as a business site tends to be as high as the reasonably probable earnings of a business there situated would justify, and the value of specially adapted plant and machinery exceeds its value as scrap only on the assumption that it is income-producing. ***
>
> * * *
>
> When a condemnor has taken fee title to a business property, there is reason for saying that the compensation due should not vary with the owner's good fortune or lack of it in finding premises suitable for the transference of going concern value. ***
>
> * * *
>
> The situation is otherwise, however, when the Government has condemned business property with the intention of carrying on the business, as where a public-utility property has been taken over for continued operation by a governmental authority. If, in such a case, the taker acquires going-concern value, it must pay for it. *Omaha v. Omaha Water Co.*, 218 U.S. 180; see *Denver v. Denver Union Water Co.*, 246 U.S. 178, 191; Orgel, Valuation under the Law of Eminent Domain § 214 (1936), and cases cited there. Since a utility cannot ordinarily be operated profitably except as a monopoly, investment by the former owner of the utility in



> duplicating the condemned facilities could have no prospect of a profitable return. The taker has thus in effect assured itself of freedom from the former owner's competition. The owner retains nothing of the going concern value that it formerly possessed; so far as control of that value is concerned, the taker fully occupies the owner's shoes.
>
> * * *
>
> *** The rationale of the public-utility cases, as opposed to those in which circumstances have brought about a diminution of going-concern value although the owner remained free to transfer it, must therefore be that an exercise of the power of eminent domain which has the inevitable effect of depriving the owner of the going-concern value of his business is a compensable 'taking' of property. See *United States v. General Motors Corp.*, 323 U.S. 373, 378; cf. *United States v. Causby*, 328 U.S. 256. If such a deprivation has occurred, the going concern value of the business is at the Government's disposal whether or not it chooses to avail itself of it. ***
>
> We conclude, therefore, that since the Government for the period of its occupancy of petitioner's plant has for all practical purposes preempted the trade routes, it must pay compensation for whatever transferable value their temporary use may have had. The case must accordingly be remanded to the District Court to determine what that value, if any, was. In making

that determination, the Court should consider any evidence which would have been likely to convince a potential purchaser as to the presence and amount of petitioner's going concern value, for this, as we have pointed out, must be considered identical with the value alleged to inhere in the trade routes. ***" (At pages 9, 12–13, 16)

Under the Federal cases just discussed, the *Miller* and *Chandler-Dunbar* cases set forth the Constitutional standard of "full fair market value" for "all available uses and purposes"; the *Standard Oil* case holds that the *appraisal* method of reproduction cost new less depreciation is a proper measure of that value criterion, although not the exclusive one; and the *United States v. 564.54 Acres of Land* and the *Kimball Laundry* cases hold that besides that physical value method, if a capitalization of the earnings at the appropriate rate of risk shows a higher value over and above the physical cost of replacement, then the higher intangible value must be the criterion.

Those Constitutional standards were not applied by the Maryland judiciary in reaching its level of value for testing the price-adequacy of the Pimlico sale.

The Maryland appellate courts relied on the trial judge's opinion by incorporating it in its entirety and quoting from it as their reasoning. (Refer to pages 13a to 28a, *infra.*) Considering the trial judge's *ratio decidendi,* it is clear that he rejected the Constitutionally required earnings capitalization approach as a matter of law, to wit:

"It is highly doubtful that capitalization of earnings is a permissible method for valuing real



property. The law of Maryland certainly indicates that it is not acceptable." (Refer to page 48a, *infra.*)

The trial judge then adopted the trustee's proffered $1,532,000 physical valuation by the "summation method"[15] as opined to by the trustee's expert Klein. One trouble was that Klein based his own reproduction cost opinion *exclusively* on the trustee's Day & Zimmermann report (Philadelphia engineers' report of 1946). This report which Klein used gave a final opined value by the summation method of $2,540,000 to $3,540,000. Klein testified to this as follows:

"A. [Klein testifying for trustee] Well, going back again, my judgment, the summation approach is the process of estimating the value of the land plus the extent to which the value or the extent to which the improvements enhanced the value of the land. Under the theory of substitution, no property should be worth more than the cost of replacing it, less the depreciation. So, in furtherance of that process and in studying and analyzing the Day and Zimmemann report, I felt that it was a reasonable conclusion and the addition of their depreciated value of $1,000,000.00 to the $532,000.00, which was my estimate of the land value, resulted in a total valuation of $1,532,000.00." (Record Extract, page 5237)

* * *

[15]The "summation method" is shorthand for the sum of the land at fair market value (ex earnings) and the reproduction cost new, less depreciation of the improvements (ex earnings).

**Q.** Mr. Klein, we were about to move from improvements to land as such, and I just wanted to, in that transition, touch one point that is more oriented toward improvements than land as we move over. I gather you relied on the Day & Zimmerman report. Did you find that report complete and satisfactory in its method of appraisal? **A.** You say I relied on it. I read it, yes, and I considered the process that they went through of considering elements of obselesence in addition to the physical condition of the property, and I adopted it, yes.

**Q.** Well, I gather without it, you would have a hole in your analysis, is that correct, as to improvements? **A.** I would say, yes.

* * *

**Q.** Well, for example, do you know what it cost at (T. 82—81) that time to build one barn, let's say, with the capacity of forty stalls of the type of construction indicated, that is, frame, wood construction, at that time? (* Text corrected as per order of the Court of Special Appeals of Maryland of December 16, 1977) **A.** Well, I haven't given attention to the cost of it, no. I have relied and adopted theirs, based upon my knowledge of their reputation as being an accurate company." (Record Extract, pages 5250-51)

As for Klein's land value, he adopted *residential value land prices* for the Pimlico land rather than determining the commercial value of the land for race track use, to wit:



"(T.82—30) By Mr. Civiletti[16]:

* * *

**Q.** All right. Now, based on that same study and work, can you please tell us what those opinions were, and why?

* * *

**A.** [Klein testifying] My opinion as to the value of this property, if it were no longer used as a racetrack facility, was between $500,000 and $532,000.

**Q.** That's for use other than a racetrack purpose, some other highest and best use? **A.** That's of the land. That's correct.

**A.** Yes, sir. **A.** My value of the land was exactly $532,000, but there would have been some demolition costs involved, and I did not finitely estimate them.

**Q.** All right, sir. **A.** As to my value, based on—of the real estate, based on its permanency and long range continued use of the facility as a racing plant, was $1,532,000. (Record Extract, pages 5227, 5230)

* * *

I found that it contained 82 acres more or less, had a frontage of approximately 2,054 feet on the

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[16]Mr. Civiletti is now the Hon. Attorney General of the United States.

north side of Belvedere Avenue. It had a frontage of about 1,584 feet on the west side of Pimlico Road, and frontage of about 1,946 feet on the south side of Rogers Avenue. *** **A.** (Continued) Had a frontage of 277 feet on Park Heights Avenue, at its intersection, running northerly from its intersection with Belvedere Avenue, and that is on the east side of Park Heights Avenue.

The property was relatively flat, as obviously having been used as a racetrack facility.

* * *

**Q.** Could you briefly describe the sales which you analyzed? **Q.** Well, as to the residential sales, the first of my comparable sales is Western Run Drive and Bancroft Road, October, 1948. That was a sale by Schwartz to Stark and I might add that my company was broker in that particular transaction, and this property sold for $45,000.00. It consisted of 21.7058 acres.

(The Court) 21.7?

(Mr. Klein) Yes, your Honor.

**Q.** Mr. Klein, have you summarized the sale [*sic*] for apartments and group homes in a chart which is part of your report, listing the location, the date, seller, buyer, price, site, size and price per acre of each of the seven sales which you used? **A.** I have, yes. (Record Extract, pages 5231, 5233).

Thus, actually, the trial judge *rejected* rather than adopted and approved the Day & Zimmermann report



and its final "summation value" of $2,540,000 to $3,540,000 by adopting witness Klein's assertion that *a component* figure in the middle of the report of $1,000,000 for certain improvements should be added to *Klein's residentially-valued land figure* of $532,000 for a "Klein-ized" "summation value" for land and improvements of $1,532,000 *if Pimlico were to be used as a race track*.[17] (Refer to pages 48a and 16a, *infra*.)

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[17]Even if one were to accept a "Klein-ized" version of the Day & Zimmermann report, the trial judge still had to add to Klein's "summation value" figure of $1,532,000 the value of the racing fund for plant improvements of $373,155 and the value of the two gas filling station sites at the capitalized value of the leases of $125,000. This is due to the fact that Day & Zimmermann and Klein omitted those additional assets. Therefore, the trial judge, by Klein's method, had a value of $2,030,155, not $1,532,000.

But given the $1,532,000 or $2,030,155 figures, the trial judge still had fatally included therein a residential-value land figure, *i.e.*, Klein's $532,000, which reflected *non-race track use*.

*Under Klein's hypothesis for the figures, that is race track utility*, the value of that land component had to be measured for its commercial value as and for a race track conducted at one of four special Maryland locations designated for that special utility. At this point, Klein's "summation value" with a lid of $1,532,000 explodes since it is obvious that the approximately 90 acres of Pimlico land at race track use and earning $644,393 on average for the past 5 years had a commercial race track capital value far in excess of the $532,000 which Klein had assigned to it for that purpose but at residential-land prices. Under *Kimball Laundry*, *supra* at page 9, it was held:

> "The market value of land as a business site tends to be as high as the reasonably probable earnings of a business there situated would justify, and the value of specially adapted plant and machinery exceeds its value as scrap only on the assumption that it is income producing."

Under the *Kimball Laundry* approach, Klein's and the trial judge's "summation value" of $1,532,000 or even $2,030,155 is in clear error because of the residential land value component of $532,000. Correctly

(footnote cont'd next page)

Klein's testimony was useless. His improvement value *rested exclusively* on a report, *which he rejected*. His land value *was not* predicated on race track use and value. His summation was in clear error as to race track value since his components were wrong. Finally, he did not compute the overall capitalized earnings value of the land and improvements as required by *Kimball Laundry, supra.*

In resting their opinions on the Klein numbers and error, the Maryland judiciary from the trial court to the appellate level have incorporated the clear error and have failed to accord "full fair market value" as required under *Miller, supra, Chandler-Dunbar, supra, Standard Oil, supra, United States v. 564.54 Acres of Land, supra*, and *Kimball Laundry, supra.*

The Maryland judiciary rejected both Constitutional tests, namely the capitalized earnings criterion was rejected, and the *full* summation value criterion for land and improvements was rejected (Refer to pages 48a and 15a-16a, *infra.*)

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(footnote cont'd)

applying the *Kimball Laundry* test, the overall physical-earnings value of the land as improved and inclusive of all business value ex management salaries and at the appropriate capitlization rate for race track risk was $6,779,014 as a proprietorship and $4,911,629 as a corporation, less the $200,000 of other assets contributed by the tenant Jockey Club as is more fully discussed in the Statement under topics **c.** and **g.(1).** The resulting value for land as improved and adapted for race track use at its highest value then was $52,351 to $73,100 per acre or for all 90 acres assembled and improved $4,711,629 to $6,579,014.

Accordingly, the Klein-trial-court-appellate-court figure for appraised value of Pimlico as and for a race track of $1,532,000 is in clear error and is unsustainable under the "full fair market value" standard of the Constitution. Approval of the trustee's sale price of $1,115,000 for Pimlico as adequate on such a basis is likewise in clear error. (Refer to pages 48a and 15a-16a, *infra.*)



The Maryland judiciary's rejection of the "full fair market value" appraisal rule required under the Constitution and by due process in turn has impacted to exclude from valuation 83% of the Pimlico business assets or 83% of their value in testing the trustee's sale price of $1,115,000 for adequacy. That clearly *un*constitutional error or "asset-stripping approach" then permitted the sale to pass muster rather than be held actionable. The resulting dismissal rather than surcharge was therefore an *un*constitutional "State action" "taking" of the private property of the remaindermen and their surcharge rights for the private use of others in violation of the Fourteenth Amendment and the *Mullane* case, the *In Re Appeal No. 769 September Term* case, the *Thompson* case and the *Missouri Pacific Rwy.* case, *supra.*

Those cases hold that on the facts here the Maryland judicial approach was in violation of due process and equal protection in that the exclusion from valuation of the subjects of valuation is not valuation at all but rather is the affirmance of a price of $1,115,000 and a rejection of true value of $6,579,014 for the desired result of relieving the trustee of surcharge, protecting the reputations of the profiteering Maryland insiders and expropriating 83% of the property and surcharge rights of the trust beneficiaries for the use and enrichment of those profiteers.

**Point (3).**

**The Maryland Judiciary Indulged In An Unconstitutional "Withheld-License Approach" Whereby 83% Of The Pimlico Business Assets Were Discounted Or Excluded Before Testing The Sale Price Of $1,115,000 For Adequacy; Failure To Appraise And Test At "Full Fair**

**Market Value" Constituted An Unconstitutional "State Action" "Taking" Under The Fourteenth Amendment.**

Pre-emptively, the Maryland judiciary *un*constitutionally held that in a trust sale, State-regulated-licensed business assets have no improved and earning power value, but are worth "land salvage value".

That holding is unprecedented and is clear error.

Contrary precedent in Maryland, Delaware and New Jersey has held that such State-regulated-licensed business assets are to be accorded "full fair market value" in commercial and fiduciary sales.

In *Charles Co. Broadcasting v. Meares*, 270 Md. 321, 311 A.2d 27 (1973), damages awarded for breach of contract for failure by seller to convey an FCC-regulated-licensed radio station were based on the going concern value of the station, not its land salvage value, even though the purchaser had actually tried and failed to obtain an FCC license to operate the station.

In *Warren v. Baltimore Transit Co.*, 220 Md. 478, 154 A.2d 796 (1959), shareholders of a PSC-regulated-franchised transit company were entitled to receive going concern investment value, not land salvage value. The appraised value was based on the earnings of the transit company capitalized at the same rate of return indicated for a comparable transit company.

In *Application of Delaware Racing Ass'n*, 42 Del. Ch. 406, 213 A.2d 203 (1965), shareholders of Delaware Park race track near Wilmington and 70 miles from Pimlico were accorded "full fair market value" for their minority



interests. Delaware Park was valued as a going concern, rather than on a liquidation basis. The annual license and racing dates required for operating were presumed for the future. The entire race track package was included in the valuation, *i.e.*, the land, the plant, and the earning power. The tangible assets were valued at replacement cost, less accrued depreciation. The intangible assets or investment value was derived from application of the multiplier of 10 or a 10% rate of return to the historical 5-year average earnings of the race track preceding valuation. The "blocked" or weighted value of the tangible and intangible values as a whole came to a final overall valuation for Delaware Park of $3,526,054 based on the plant value and the earnings of $182,568.

In *Matter of Westhall*, 125 N.J.Eq. 551, 553-54, 5 A.2d 757 (1939), a New Jersey bank acting as administrator was surcharged for incurring an inadequate sale price and capital loss in an estate when it sold a State-regulated-licensed mortician business at its lower book value, rather than at its higher investment or capitalized earnings value. The court rejected the bank's discount defense, which was that there were no business earnings and no investment value to take into consideration because the estate did not own and could not convey the State license required to operate the assets. In rejecting that argument, the court presumed that the requisite license would issue for operation of the assets upon a showing by the operator of compliance with the regulatory scheme. The burden of compliance and obtaining the license fell on the purchaser of the mortician business.

The constitutionally compelled presumption of the *Meares, Warren, Delaware Racing* and *Westhall* cases, *supra*, is that the fact of regulation and licensing of the

radio station, transit system, race track and mortician businesses involved there established by logical inference the State's promotion of the commercial worthiness of those special purpose business assets for their highest and best use.

In the present case, such reasoning dictates that the only basis for holding that Pimlico Race Track was worth merely its land salvage value for non-race-track use would have been if the Maryland legislature had declared race tracks illegal or had declared that a race track at the Pimlico site was illegal.

But neither of those contingencies ever occurred.

On the contrary, the Maryland legislative scheme pertaining to race tracks and their locations prescribed just the opposite, *namely that race tracks were legal and that Pimlico was meant to operate at its site and under its quota of racing days.*

Disregarding the positive law which authorized Pimlico to operate, the Maryland judiciary say *they feel* that the trust or its agent or buyer could not have obtained a license for Pimlico, but that the Jockey Club alone was the only one which could have received a license there. (Refer to pages 17a-18a, 24a-27a and 49a-52a, *infra.*)

As the trial judge expressed it and the appellate court then quoted verbatim, the Maryland judiciary's incorrect understanding was as follows:

> "The Trustee had neither a dead track to sell to someone interested in going into the racetrack business, nor did it hold a going concern which it could offer to one who wanted to buy a racetrack business. It held a racetrack which was under lease to the Maryland Jockey Club, who had the (T.87—12) only available license to use that property for that purpose. ***
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> * * *
>
> It seems clear that if the Maryland Jockey Club and Pimlico had parted company, the license would have gone with the Maryland Jockey Club and not to the successor in possession of Pimlico. ***" (Pages 51a and 26a, *infra.*)



The "withheld-license approach" is improper under the Constitution and is unsustainable under the Maryland racing law itself for the reasons now considered.

A license-applicant has *a substantive constitutional right to qualify for and receive a license* when required to operate a regulated activity or race track. *E.g., Medina v. Rudman*, 545 F.2d 244, 250–51 (1st Cir. 1976), *cert. denied*, 434 U.S. 891 (1977) (racing license); *Bruce v. Dir., Chesapeak Bay Aff.*, 261 Md. 585, 606-07, 276 A.2d 200, 211 (1971); *Gonzales v. Ghinger*, 218 Md. 132, 136–37, 145 A.2d 769, 771–72 (1958); *Benner v. Tibbitt*, 190 Md. 6, 20, 57 A.2d 346, 353 (1948); *Dasch v. Jackson, 170 Md. 251, 252, 264-70, 183 Atl. 534, 539-42 (1936); Goldman v. Crowther*, 147 Md. 282, 306-08, 312, 128 Alt. 50, 59, 61 (1925); *Mayor of Baltimore v. Radecke*, 49 Md. 217 (1878); *Hialeah Race Course, Inc. v. Board of Business Regulation*, 270 So.2d 366, 369 (Fla. 1972) (racing dates); *Hialeah Race Course, Inc. v. Gulfstream Park Racing Ass'n*, 245 So.2d 625, 629 (Fla. 1971) (racing dates); *Landers v. Eastern Racing Ass'n*, 327 Mass. 32, 45–46, 97 N.E. 2d 385, 394 (1949) (racing license).

In *Hutzler Bros. Co. v. Remington Putnam Book Co.*, 184 Md. 327, 334, 40 A.2d 823, 826 (1943), it was held:

> "The law presumes that every man will conduct his business in conformity with the law. . ."

In *Benner, supra* at the cited pages, the court caused a withheld permit to issue by the regulatory authority without a showing that the applicant was in fact in conformity with the regulatory scheme, but merely on the legal presumption of compliance.

*Medina v. Rudman, supra* is the leading Federal constitutional case concerning the substantive right of a citizen to require issuance of a state license to operate a race track. In *Medina,* the First Circuit Court of Appeals held that under the circumstances of that case it was proper for the New Hampshire commission to have refused a race track license to the applicant-new-entrant over her claim that such refusal deprived her of property and opportunity under the due process clause of the Fourteenth Amendment. Judge Campbell reasoned for the court (1) that New Hampshire had not recognized a pre-existing common law right of a citizen to operate a race track, and (2) that New Hampshire had not by positive law granted a general right to all of its citizens to operate a race track. Accordingly, the applicant-new-entrant had no pre-existing, vested property interest which would have been taken away or expropriated if the license were withheld. Therefore, New Hampshire, it was reasoned, had the discretion to deny the applicant a license under those circumstances. The first *Medina* test noted above in (1), which we shall call here the "pre-existing business" test, was explained by Judge Campbell as follows:



> "While the Supreme Court in these cases recognized in passing the existence of a class of 'fundamental' liberties (said to trigger 'substantive' rather than merely 'procedural' protection, see *Kelly v. Johnson, supra*, at 244 [425 U.S.], 96 S.Ct. 1440, *Paul v. Davis, supra*, at 710n.5, 712-13 [424 U.S.], 96 S.Ct. 1155), the Court defined this class rather narrowly, [footnote omitted] reserving particular emphasis for those 'liberty' or 'property' interests which attain status as such under the due process clause 'by virtue of the fact that they have been initially recognized and protected by state law'. *Paul v. Davis, supra,* at 710 [424 U.S.], 96 S. Ct. at 1165. The Court said it is the alteration or extinguishment of a right or status previously recognized by state law that invokes the procedural guarantees contained in the due process clause. *Id.* at 711, 96 S.Ct. 1155.
>
> Under this approach, it is difficult to see how New Hampshire law can be said to recognize or create a vested right or status in favor of potential greyhound license applicants which defendants here are taking away. *** . . . nothing has so far been promised or granted by the state to Mrs. Medina." (*Medina, supra* at 250).

The second *Medina* test noted above in (2), which we shall call here the "general licensee" test, was explained by Judge Campbell as follows:

> "A state-recognized interest might also exist if the New Hampshire racing law could be said to confer upon Mrs. Medina a right, upon equal terms with others generally, to be licensed to engage in a common activity or pursuit. ***

> . . . the *Paul* Court said that 'the right to purchase or obtain liquor in common with the rest of the citizenry' was a right held under state law. *Paul v. Davis, supra*, at 708. . . . This circuit has held that obtaining a driver's license is subject to due process protection, *Raper v. Lucey*, 488 F.2d 748 (1st Cir. 1973), and the same has been held in another circuit with respect to a radio operator's license. *Homer v. Richmond*, 110 U.S.App.D.C. 226, 292 F.2d 719 (1961). In these cases, the government recognized an entitlement in favor of all persons, or of a class, upon terms and conditions of general application.
>
> But racing licenses have not been viewed by the New Hampshire courts as open to all persons. . . ." (*Medina, supra* at 250–51).

While in *Medina*, the license was denied for those reasons, nevertheless, just the opposite occurs in this case under those same two *Medina* tests, *i.e.*, as explained below, the trust's Pimlico Race Track rights fitted (1) the "pre-existing business" test, and (2) the "general licensee" test, such that the Maryland racing commission had to grant the mandated license to the trust or its agent or buyer under the protection of the Fourteenth Amendment.

*In the first classification* where the *Medina* case requires a license to issue by reason of the due process–equal protection guarantees, Pimlico qualified as a "pre-existing business".

The trust's lease-out to its agent-tenant under the four rolled-over 1913-47 management agreements did not change the trust's *original rights and status* as owner of Pimlico Race Track.



Thus, in *Riden v. Philadelphia, B & W. R. R. Co.*, 182 Md. 336, 339–40, 344–45, 346–47, 35 A.2d 99, 100–01, 102–03, 104 (1943), it was held that *an owner-lessor continues to own and hold all the rights and priveleges which he had before entering into a long-term lease* unless there is some further conveyance by the owner-lessor beyond that of the mere use of the property by the tenant.

Secondly, in *Riden, supra*, it was further held:

> "horse racing has been one of the most popular sports in Maryland since Colonial days and has long been fostered by this State. . . ."

At common law prior to introduction in 1920 of the State racing regulatory and licensing scheme, the creator and the trust owned and held a business proprietorship at Pimlico Race Track which *the common law* recognized specifically as *a proper* enterprise of conducting horse races and parimutuel wagering. *E.g., Greenfield v. Maryland Jockey Club*, 190 Md. 96, 103, 57 A.2d 335, 337 (1948); *James & Gamble v. State*, 63 Md. 242, 253–54 (1885); *Madden v. Queens County Jockey Club*, 296 N.Y. 249, 256, 72 N.E.2d 697, 698–99 (1947).

In *Greenfield, supra* at 103, 337, it was held:

> "Wagers were legal at common law. . . . In Maryland betting on horse races (including 'Paris Mutual' pools) was not a crime at common law. . . ."

In *James and Gamble, supra* at 253–54, it was held:

> "*Betting money is not an offence by the common law*; and is punishable only in the particular cases which are made criminal by statute. *Horse races*

*have been . . . favored by our legislation.* *** *Persons may attend the races and hazard their money as freely as they choose by betting on the horses, and they will not thereby become amenable to any legal penalties.* ***" (Emphasis supplied)

In *Madden, supra* at 256, 698-99, it was held:

"That, though, overlooks *the fact that the privelege of conducting horse races for stakes does exist at common law*, that it is taken away only by statute, and that the statute's prohibition is removed only under certain circumstances and upon compliance with specified conditions."

Therefore, in this case, the trust qualified under the first *Media* test, *i.e.* it had a "pre-existing business" which was lawful prior to the institution of the Maryland licensing scheme of 1920.

Under the *Medina* holding, the trust or its agent or buyer had *a constitutionally protected common law right and status to require issuance of a license and dates.*

Under the second *Medina* test, *i.e.,* the "general licensee" test, the trust or its agent or buyer likewise qualified for a license and dates.

At the time of sale, the Maryland racing law provided for a general class of licensees as follows:

"7. *Any person or persons, association or corporation*, desiring to conduct racing within the State of Maryland during any calendar year, shall apply to the Maryland Racing Commission for *a license* so to do. ***" (Md. Sess. L. of 1946



(Spec. Sess.) ch. 3, Sec. 1, para 7) (Emphasis supplied)[18]

The clear legislative intent to license the one-mile race tracks by location and to leave the licensee class general as to Pimlico, Laurel, Havre de Grace and Bowie, which were one-mile race tracks licensed under para 7 above, is re enforced when considered along with the special licensee scheme adopted by the legislature for the six Maryland half-mile race tracks which under para 14 of the same racing law were individually licensed by the specific association owning the half-mile track as follows:

"14. In addition to licensing racing as hereinbefore provided, *the Racing Commission is authorized to issue licenses to the following organizations*: Agricultural and Mechanical Association of Washington County, Cumberland Fair Association, Inc., Pocomoke Agricultural Fair Association, Inc., Harford County Fair Association, Inc., Southern Maryland Agricultural Fair Association of Prince George's County, and Maryland State Fair and Agricultural Society of Baltimore County. Such licenses shall permit the holders to conduct a race meeting or meetings with betting priveleges, not to exceed ten days for any one organization in any calendar year, provided such meetings are held in connection with or for the benefit of bona

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[18]The Maryland racing law scheme conferred merely an annual license, not a franchise. *Greenfield v. Maryland Jockey Club*, 190 Md. 96, 57 A.2d 335 (1948); *Madden v. Queens County Jockey Club*, 296 N.Y. 249, 72 N.E.2d 697 (1947).

fide County Fairs or Agricultural Exhibitions and are held in compliance with all the provisions of this Article." (Md. Sess. L. of 1941, ch. 514, Sec. 1, para 14)[19] (Emphasis added)

Furthermore, the insider's proposed Bill and the trustee's proposed Amendment did nothing to alter the above-quoted language of para 7 as to the general class of licensees or Pimlico as a racing site.

Therefore, the trust qualified under the second *Medina* test, *i.e.* it was entitled to receive a license under the Maryland approach which permitted "Any person or persons, association or corporation" to receive a license as a "general licensee".

To summarize, under the Fourteenth Amendment and both *Medina* tests, *i.e.* the "pre-existing business" test and the "general licensee" test, the trust or its agent or buyer had a constitutionally enforceable right to require a license and racing dates to be issued by the Maryland racing commission on equal terms with the owners of the other three competing Maryland one-mile race tracks, namely Laurel, Havre de Grace and Bowie.

*A fortiori*, the Maryland judiciary's *un*constitutional holding that the trust could not receive a license, nor could its agent or buyer, and only the Jockey Club could have the license at Pimlico is clear error which requires just the opposite outcome in this case.

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[19]See the continuation of the same special licensee approach for half-mile tracks and the same general licensee approach for one-mile tracks in the post-valuation-date provisions adopted later in 1947. Md. Session. L. of 1947, ch. 502, para 14 and para 7.



As it now stands, the misapplication of the licensing rules for purposes of the valuation at hand has resulted in excluding from valuation 83% of the Pimlico business assets or 83% of their value in testing the trustee's sale price of $1,115,000 for adequacy. That clearly *un*constitutional error or "withheld-license approach" then permitted the sale to pass muster rather than be held actionable. The resulting dismissal rather than surcharge was therefore an *un*constitutional "State action" "taking" of the private property of the remaindermen and their surcharge rights for the private use of others in violation of the Fourteenth Amendment and the *Mullane* case, the *In Re Appeal No. 769 September Term* case, the *Thompson* case and the *Missouri Pacific Rwy.* case, *supra.*

Those cases hold that on the facts here the Maryland judicial approach violated due process and equal protection in that the exclusion from valuation of the subjects of valuation is not valuation at all but rather is affirmance of a price of $1,115,000 and a rejection of true value of $6,579,014 for the desired result of relieving the trustee of surcharge, protecting the reputations of the profiteering Maryland insiders and expropriating 83% of the property and surcharge rights of the trust beneficiaries for the use and enrichment of those profiteers.

**Point (4).**

**Because of Their Clear Bias Toward Out-Of-State Remaindermen And Their Unconstitutional Procedural And Substantive Handling Of This Case, A Fair Outcome In This Case Cannot Be Expected From The Maryland Judiciary; Accordingly, If This Petition Is Granted And A Reversal Is Ordered, This Court Should Make A Specific Ruling As To Damages In Order To Assure That Due Process Is Met.**

The incredible attitude of the Maryland judiciary seems to be that it has the power under Maryland's constitution to rewrite the Maryland racing law to fit its exclusionary or discounting approach to valuation and testing here.

The discussion above makes clear that not only did the literal terms of the racing law rule out the Maryland judiciary's concept that Pimlico was delicensed, but further makes clear that all of the racing assets—land, plant and earning power—were licensable, *i.e.* 100% of the values sold, and that all of those assets were worth full value to anyone owning or acquiring the race track.[20]

The Maryland constitution prohibits the Maryland judicial branch from rewriting the racing laws. Constitution of Maryland of 1867, Declaration of Rights, Article 8; *Bruce v. Dir., Chesapeake Bay Aff.*, 261 Md. 585, 606-07, 276 A.2d 200, 211 (1971).

Further, "special laws" are prohibited in Maryland where general laws have been passed. Constitution of Maryland of 1867, Article III, Section 33.

The licensing provisions of para 7 of the Maryland racing law not only could not be rewritten by the Maryland judiciary, but qualified as general law by express declaration. Md. Sess. L. of 1946 (Spec. Sess.), ch. 3, Sec. 1, para 7 and Sec. 2, para 15B.

What the Maryland judges have wrongly proposed as their *ratio decidendi* in this valuation at bar is that they may disregard the plain meaning of the racing law and

[20]What is also clear is the other side of the coin, namely without those racing assets the Jockey Club was out of business at Pimlico and facing a $6 to $8 million construction bill for a new race track.



even the plain meaning of their constitution, as well as the facts.

Contrary to law and fact, the Maryland judges propose that Pimlico was delicensed (except in the hands of the insider buyer) and worthless (except in the hands of the insider buyer).

This was not only Maryland judicial approval of *outright race track stealing* at that price, but was also a straight denial of equal protection of Maryland law in violation of the Fourteenth Amendment of the United States Constitution.

For the reasons discussed above, the entire scenario was and is, unless reversed, an outright expropriation of private property of out-of-state remaindermen through the trust vehicle for the private use of Marylanders and by judicial fiat. All of this is in clear violation of the principles announced in the *Thompson* and *Missouri Pacific Rwy.* cases, *supra*.

The conduct and attitude of the Maryland judiciary in this case has regrettably been as discussed above and constitutes a concerted attempt to cover up and abstain from proper adjudication for the purpose of protecting the local economy, the trust company and the reputations of the Maryland profiteers at the expense of the innocent and economically destroyed remaindermen.[21]

None of the Maryland judiciary's opinions in support of that result and set forth in the Appendix demonstrates

[21]Besides their disastrous 1947 capital loss and the astronomical consequences to date, the Maryland judiciary are imposing on the remaindermen the decreed obligation to pay not only all of the court costs amounting to about $100,000, but also all of the trustee's attorneys fees and expenses, which counsel for the trust company smugly assert will be in the order of $600,000.

by the numbers what Pimlico Race Track was worth at the date of sale and certainly none makes reference to market pricing of comparable race tracks and their earnings and prices and capitalization rates at the date of sale.

When the remaindermen have put in evidence a complete appraisal of what Pimlico Race Track was worth by their expert, Mr. C. E. O. Walker, who was the retired head of the financial appraisal division of the largest appraisal company in the world, The American Appraisal Company, it requires more adjudication and fact-finding by the courts of Maryland to reject that professional study and conclusion than what the trial judge did, which was to rule that *it was irrelevant as a matter of law and that he did not believe it anyway*. (Refer to pages 46a-48a, *infra.*)

Much more in the way of fact-finding and adjudication is required of the trial court in dealing with the valuation opinions of the trustee's two experts, Klein and Kovach.

Mr. Klein's opinion has already been considered at pages 53-58 above.

Mr. Kovach was the trust company's broker. In spite of his being a "business captive" expert, he was still allowed to testify for his business captor. He gave *his* "judgment" of the value of a hypothetical race track at Pimlico. Therefore, he avoided opining on the issue in the case of what the value of the trust's Pimlico business assets was. But of far more significance in terms of error was Kovach's approach to the historical Pimlico earning power capitalization which he put together as a critique of Mr. Walker's valuation of the Pimlico business assets owned by the trust. Mr. Kovach's *purported earnings appraisal* would have been inadmissible in evidence in a Delaware appraisal proceeding since he violated every one



of Delaware's appraisal rules designed to prevent *fraudulent appraisal method* from entering into the valuation process.[22]

For example, Mr. Kovach based his entire opinion of earnings value on *falsely derived capitalization rates*, which were not what the marketplace was saying at all, but were merely arranged numbers which Mr. Kovach said were his capitalization rates. Thus, Mr. Walker had professionally derived capitalization rates composed of known, reported earnings related to the known, reported stock prices for the comparable race track companies as of or just before the valuation date. From that he found the marketplace capitalization rate for use in applying it to the Pimlico earnings to show what the marketplace would have accorded as a capital value for Pimlico. But Mr. Kovach made some notable and *self-destructive* departures. Mr. Kovach derived his capitalization rate by *mis*matching (a) post-valuation-date stock prices of the comparable race track companies, with (b) their post-valuation-date earnings reported publicly at 10 to 15 weeks or 69 to 108 days after the much earlier stock prices had been posted. What Mr. Kovach ended up with was not a capitalization rate. It looked like one, but it was not one. This is because he had *the reverse* of a true capitalization rate. He had *mis*matched numbers showing *earlier stock prices being evaluated by later earnings* if such a thing is possible. Obviously, just the reverse must apply if the capitalization rate is to have any foundation in investors' judgment of what they will pay for earnings, *i.e.* the earnings must precede the stock price evaluation and both earnings and prices must be *reported and known* by the

[22]It is inferable that Mr. Kovach read the Delaware cases and then adopted the procedures for valuation which Delaware considered fraudulent.

investor public at or prior to the valuation date. That is what Delaware holds; that is what Mr. Walker complied with; and that is what Mr. Kovach fatally did not comply with.

There were several other major discrepancies between Mr. Kovach's methods of valuation and what the Delaware appraisal rules require for protection against fraudulent appraisals. Mr. Kovach had the wrong quanta of earnings for the appraisal comparable companies and Pimlico. Delaware requires an average of five years of historical earnings directly preceding the valuation date adjusted only to exclude non-recurrent items. Mr. Kovach did not make all the necessary adjustments for nonrecurrency and used one-year, not the average of five-years of earnings, following the valuation date, rather than preceding it. There were other substantial errors as well.[23]

Apparently the trial court was concerned enough about the Kovach number rigging that it never mentioned the result or his derivation. (Refer to page 47a, *infra.*)

Instead, the trial court ruled an earnings valuation irrelevant as a matter of law and adopted Mr. Klein's bogus valuation of $532,000 salvage value for land upgraded to $1,532,000 going concern value for the improved land ex earnings. (Refer to pages 48a-49a and 15a-16a, *infra.*)

The fatally defective Klein opinion has already been discussed at pages 53-58 above.

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[23]There appears to be no difference between Delaware's appraisal rules on the subject and this Court's capitalization of earnings rules listed in *Kimball Laundry*, *supra* at 16-18 and notes 7-9.



In this case then, the Maryland judiciary have simply looked the other way in accepting trumped-up, fraudulent appraising from the trustee's purported experts, whose methods do not hold up under the Delaware appraisal rules and this Court's own appraisal rules set forth in the *Kimball Laundry* case, *supra* at 9, 16-18 and notes 7-9.

The Maryland judiciary have abstained from fact-finding and adjudication as to true value. They have avoided deciding the very issue in the case.

The Maryland judiciary's attempt at valuation of the Pimlico Race Track here is set forth in the Appendix *infra* and clearly does not even begin to compare with the forthright and rational race track appraisal which the Delaware judiciary expertly made in the leading case of *Application of Delaware Racing Ass'n*, 42 Del. Ch. 406, 213 A.2d 203 (1965). Examination of the *Delaware Racing* case alongside this one makes it clear that the Maryland judges in this case made no attempt to appraise Pimlico Race Track and were only willing to fictionalize that Pimlico did not exist as a race track, when it very much did, and were only content on finding *"land salvage value"* as Pimlico's highest and best level of use and value in order to hold the trust company harmless.

Given the bent of the Maryland judiciary to avoid briefing and proper decision-making and fact-finding, for justice to triumph here, a reversal and remand to that State court system would have to be made under *specific instructions* as to value-finding along the lines afforded by the Delaware appraisal rules, which Maryland recognizes as expert and persuasive, but has refused to apply in this case. *Warren v. Baltimore Transit Co.*, 220 Md. 478, 483-84, 154 A.2d 796, 799 (1959).

If *specific instructions* requiring what a Delaware appraisal would afford are not given, it is clear that Maryland political influences will again take hold to expropriate the long-suffering remaindermen and to deny the due process and equal protection guarantees of the Fourteenth Amendment.

It is submitted that *a Delaware appraisal* meets those standards and should be ordered *under specific instructions* in any reversal and remand of this case to the Honorable Maryland judges.

Of course, a Delaware appraisal by this Honorable court would be most preferable. But a *special master* might be required to go into the specific facts for such an approach to be taken at this level.

* * *

The public policy involved here is considerable.

As a quantitative matter, within the span of each American generation, all private-sector property in the United States with minor exception—$x-trillion—passes into a State-regulated fiduciary control entity such as a corporation, partnership, guardianship, trust or estate.

Such entities split the business control aspect of the $x-trillion of property from the equitable enjoyment so that the true owners must submit to the discretionary policies of management with only the courts for protection.

At stake when there are management agreements, leases or sales is what substantive rules shall govern the conveyance of the $x-trillion of property held in such entities for the protection of the true owners against fraud



or manipulation by the fiduciaries and their insider friends.

Until Maryland spoke on the subject in this case, the rest of the Nation would have conceded the obvious that the rule should be "full fair market value" in a fiduciary sale, *i.e.* either what the asset actually sells for in a fully advertised, public auction to the highest bidder ("extrinsic value"), or else if a private sale, what a comparative appraisal shows the reconstructed sale value would be by reference to public sales of other similar assets ("intrinsic value").

Maryland says not so at all. On the contrary, value in Maryland is all based on land value ex earnings and on private insider pricing, regardless of whether other assets are also transferred with the land. Maryland says that *business assets* sell for residential land value and one must by law disregard the earnings value and capital improvement value of the conveyed assets, which may be bought privately by Maryland insiders *for no price consideration.*

No other State in the Union has ever so held.

That is the first *un*constitutional conflict between Maryland and the rest of the Union.

Further, in this case, Maryland goes on to say pre-emptively that State-regulated-licensed business assets are not to be included in the valuation package for fiduciary sale purposes because the license cannot be conveyed with them to the insider purchaser. Therefore, the entire package has no going concern value to the insider and must be discounted as a matter of law to "land salvage

value" from "full fair market value" even if a windfall profit is made by the insider who may obtain the license and realize the "full fair market value".

Of course, that nonsense is not followed by other States. *E.g., Kimball Laundry Co. v. United States,* 338 U.S. 1 (1949); *Application of Delaware Racing Ass'n,* 42 Del. Ch. 406, 213 A.2d 203 (1965); *Matter of Westhall,* 125 N.J. Eq. 551, 5 A.2d 757 (1939).

Why Maryland should choose to depart from the clear precedent and anti-racketeering rule of the other States is inexplicable.

But the Maryland rule announced in this case marks that *un*constitutional departure from the rest of the Nation and what custom and usage in the marketplace have always been.

It is earnestly submitted that the Maryland rule of discount from "full fair market value" to "land salvage value" is abhorent and violates the Fourteenth Amendment.

Unless Maryland's departure from the "full fair market value" standard is corrected by this Court, it will stand as a beacon for judicial approbation of racketeering in the sale of fiduciary business properties whereby the dishonest fiduciary is permitted to create through the discount conferred on the insider the wherewithall to be paid back under the table for arranging the discount—kickbacks, if you will.

How prevalent such a practice is among leading trust companies, private trustees and other fiduciaries is



guesswork.[24] But it is clear that as a result of this case the permissibility of such conduct is now protected by Maryland's "land salvage discount" from "full fair market value".

For such a traditionally strict and rigidly enforced area as fiduciary sale conduct suddenly to become as unglued and dangerously permissive as Maryland now has just allowed is regrettably consistent with what that State breeds in the area of conduct by publicly elected officials and deserves the same decisive overturning and reprimand to the end that Maryland-style corruption and irresponsi-

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[24]There are recent cases, however, holding that the fiduciary should be surcharged in money damages for selling valuable trust or estate assets for an inadequate price, namely: *E.g., Belcher v. Birmingham Trust Nat'l Bank*, 348 F. Supp. 61 (N.D. Ala. 1968); *Rippey v. Denver United States Nat'l Bank*, 273 F. Supp. 718 (Col. 1967); *Matter of Rothko*, 84 Misc.2d 830, 379 N.Y.S.2d 923 (Surr. Ct., N.Y. Co. 1975), *modified on rescission and affirmed on money damages*, 56 A.D.2d 499, 392 N.Y.S.2d 870 (1st Dep't 1977), *aff'd*, 43 N.Y.2d 305, 401 N.Y.S.2d 449, 372 N.E.2d 291 (1977); *Wilmington Trust Co. v. Coulter*, 41 Del.Ch. 548, 200 A.2d 441 (1964). Maryland itself has had need to order rescission, namely: *Webb & Knapp v. Hanover Bank*, 214 Md. 230, 133 A.2d 450 (1957). The cause of action for surcharge of a fiduciary for selling a fiduciary asset for an inadequate price has long been recognized as necessary to protect against the prevalent intrigue of corrupt fiduciaries: *Taylor v. Tabrum*, 6 Sim. 281, 58 Eng. Rpt. 599 (1833); III *Scott on Trusts* § 205, p. 1667 (3rd ed. 1967); *Bogert on Trusts and Trustees* §§ 706 and 747 (2nd ed. 1960); *Restatement (Second), Trusts* § 205, *Comment d.* (1959).

Of course , the present case raises the question of what is *the Constitutionally required State judicial standard for valuation and testing* such fiduciary sales where the beneficiaries assert the well-recognized claim of price inadequacy and request surcharge to make them whole for the capital and income loss effected under the guise of a routine trust sale.

bility shall not be tolerated at the national level and shall be struck down under our Constitution.

It is respectfully submitted that word from this Court is desirable and in the public interest to contain and overrule Maryland's corruptly fashioned judicial valuation standard of "land salvage discount" from "full fair market value".

## CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted

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September 4, 1979

# APPENDIX

# APPENDIX

## ORDER OF MARYLAND COURT OF APPEALS DATED JUNE 6, 1979

(Filed June 6, 1979)

| | | |
|---|---|---|
| PETER H. MADDEN and MICHAEL J. MADDEN | ) | IN THE |
| v. | ) | COURT OF APPEALS |
| MERCANTILE-SAFE DEPOSIT AND TRUST COMPANY, Trustee and Individually, et al. | ) | OF MARYLAND |
| AUDREY COSDEN et al. | ) | Petition Docket No. 71 |
| v. | | September Term, 1979 |
| MERCANTILE-SAFE DEPOSIT AND TRUST COMPANY, Trustee, et al. | | (No. 796—September Term, 1977, Court of Special Appeals) |

**ORDER**

Upon consideration of the petitions for writ of certiorari to the Court of Special Appeals and the answers filed thereto in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petitions be, and they are hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

June 6, 1979.

## OPINION OF MARYLAND COURT OF SPECIAL APPEALS DATED MARCH 7, 1979

In the Court of Special Appeals of Maryland

**AUDREY COSDEN ET AL. V. MERCANTILE-SAFE DEPOSIT AND TRUST COMPANY, TRUSTEE ET AL.**

**[No. 796, September Term, 1977.]**
**Decided March 7, 1979.**

Appeal from the Circuit Court of Baltimore City (Ross, J.).

Bill of complaint for declaratory decree filed by Mercantile-Safe Deposit and Trust Company, trustee against Audrey Cosden, Anne Hallenbeck, Jane Humphreys, Michael Madden, Peter H. Madden and Christina Madden for the court to assume jurisdiction of trust to determine final distribution. Counterclaim filed by respondents Michael Madden, Christina Madden and Peter H. Madden with issues being joined on third amended counterclaim joining The Maryland Jockey Club of Baltimore as counter-defendant along with cross-claims filed by certain of the respondents. From a decree granting complainants' motion to dismiss the counterclaims, striking certain testimony and awarding counsel fees, beneficiaries appealed. Court of Special Appeals of Maryland affirmed the decree of the lower court except for that part which dismissed the counterclaim and remanded case for further proceedings. From these latter proceedings and subsequent decree Peter H. Madden, Michael Madden, Christina Madden and Audrey Cosden appeal.



Decrees affirmed except as to counsel fee allowed in decree of May 11, 1977. Case remanded for further proceedings as to counsel fees. Appellants to pay costs.

The cause was argued before Morton, Thompson and Couch, JJ.

*Peter Parker*, with whom were *Clarke Murphy, Jr., Nicholas G. Penniman, III, Robert C. Prem, Charles H. Palmer, III,* and *Alexander Gordon, IV*, on the brief, for appellant Audrey Cosden. Submitted on briefs by Peter H. Madden, Michael Madden and Christina Madden, other appellants.

*H. Vernon Eney* and *J. Cookman Boyd, Jr.*, with whom were *John W. Scheflen* and *Venable, Baetjer & Howard* on the brief, for appellees.

Thompson, J., delivered the opinion of the Court.

We are concerned with whether or not the Mercantile-Safe Deposit and Trust Company, as Trustee under the will of William R. Hammond, should be surcharged for a breach of trust in selling the grounds upon which Pimlico Race Track is located for an inadequate price. There are also questions concerning the proper allowance and allocation of the Trustee's commissions and of counsel fees. The case was last before this Court in 1975, *Madden v. Mercantile-Safe Deposit and Trust Co.*, 27 Md. App. 17, 339 A.2d 340 (1975). We there summarized the relevant facts as follows:

> "William R. Hammond became the owner, in 1905, of some 78 acres of land, with improvements, known as Pimlico Race Track, then located in Baltimore County but which, by later annexation, became a part of the City of Baltimore. The entire property was leased to The Maryland Jockey Club of Baltimore City, which conducted horse racing there. Mr. Hammond, then a widower, died in 1909. His will left the Pimlico property and other assets to Safe

Deposit and Trust Company of Baltimore, now Mercantile-Safe Deposit and Trust Company,[1] in trust, and provided, with minor exceptions not now material, that the income be paid to his only child, a daughter, Audrey F. Hammond, for her life. The daughter later became Mrs. Audrey Hammond Madden. In his will the testator gave his daughter a power of appointment, and provided that if she did not exercise the power, the principal of the trust would, at her death, go to the persons who would be entitled to it as if he had died intestate.

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[1]We shall refer to the trustee throughout as 'Mercantile', although that part of the name was acquired by merger in 1953.'

"Through successive leases negotiated between them from time to time, the Pimlico property held by Mercantile, enlarged by the later acquisition of certain contiguous parcels, was continuously leased to the Jockey Club, until August 1947. Under an agreement of sale dated 30 April 1947, the Trustee sold the Pimlico property which it held to the Jockey Club for $1,115,000. Settlement of that sale in August 1947 terminated the lease which, by its terms, would have ended in 1949.

Mrs. Madden, in 1943, irrevocably released the power of appointment she had under her father's will. The legal effect of that release was determined by the Court of Appeals in *Madden v. Mercantile-Safe Deposit and Trust Co.*, 262 Md. 406, 278 A. 2d 55 (1971). Her release of the power of appointment, thus rendering impossible a divestiture of the remainder, which she could have accomplished by an exercise of the power, did not, as she contended, merge the remainder with her life estate, on the ground that she was the sole person who would have been entitled to



take if Mr. Hammond had died intestate. On the contrary, said the Court of Appeals, the class of persons entitled to the remainder was to be determined at the time of Mrs. Madden's death, and would be those persons who then would have been entitled, according to the law in effect in 1909, to take Mr. Hammond's estate had he died intestate.

"To continue this narrative,, we quote from the opinion in *Madden v. Cosden*, 271 Md. 118, 314 A. 2d 128 (1974), an earlier appeal from an order entered in the present case, where the Court of Appeals said, at 119-20:

> 'Mrs. Madden died on 4 January 1972, survived by three daughters, Audrey Cosden, Anne M. Hallenbeck, and Jayne Humphreys, each of whom have descendents, and by three grandchildren, Peter H. Madden, Michael J. Madden and Christina Little Madden, the children of Mrs. Madden's only son, James H. Madden, who had died in 1953.
>
> 'Immediately following Mrs. Madden's death, Mercantile-Safe Deposit and Trust Company (the Mercantile), trustee of the trust estate created by Mr. Hammond's will, caused to be prepared a schedule of the assets then comprising the trust, which had a value of some $3,000,000.00, and of a proposed distribution, under which Mrs. Cosden, Mrs. Hallenbeck and Mrs. Humphreys, daughters of Mrs. Madden and granddaughters of Mr. Hammond, would each receive one-fourth of the trust assets, and Peter H. Madden, Michael J. Madden and Christina Little Madden, grandchildren of Mrs. Madden and great-grandchildren of Mr. Hammond, would each receive one-twelfth of the trust assets, since they shared equally the one-fourth share which would have passed to their father, if living.
>
> 'When it became apparent that all of the children of James H. Madden were not willing to acquiesce in the proposed distribution, the Mercantile in June,

1972, filed in the Circuit Court of Baltimore City a bill of complaint which recited the circumstances; asked that the court assume jurisdiction of the trust, and determine the proper distribution of the trust estate.

* * *

"The issue presented and decided in *Madden v. Cosden, supra,* was the validity of Mrs. Madden's second marriage, following a Nevada divorce, and whether Mrs. Hallenbeck and Mrs. Humphreys, children of that second marriage, were entitled, as lawful heirs and next of kin of Mr. Hammond, to share in the distribution. The Court of Appeals held that they were.

"The Present Case in the Circuit Court

"Mercantile's bill of complaint to determine the proper distribution of the trust was filed in the Circuit Court of Baltimore City on 23 June 1972. Combined answers, cross-claims, and counterclaims filed by Peter H. Madden on 21 August and 23 August were later stricken, apparently for reasons of form, and on 26 December 1972, with leave of court, he filed an amended counterclaim, naming as counterdefendants Mercantile, in its trust capacity and in its individual capacity, and, as an added party, the Jockey Club. Leave to bring in the Jockey Club as a counterdefendant was later granted. At the same time he filed his answer to Mercantile's complaint Peter H. Madden filed the cross-claim against his codefendants which raised the issue decided in *Madden v. Cosden, supra.*

"On 10 April 1973, with leave of court, Peter H. Madden filed a second amended counterclaim, in which Audrey Cosden joined. On 17 May 1973, with leave of court, a third amended counterclaim, in which Michael Madden and Christina Madden also joined as countercomplainants, was filed.



"The Counterclaim alleged that in selling the Pimlico Race Track to the Jockey Club in 1947, Mercantile had breached its fiduciary duty in numerous ways, resulting in the disposition of a trust asset for an inadequate price. It sought to surcharge Mercantile for the difference between the sale price and the actual value, or, in the alternative, to rescind the sale." 27 Md. App. at 20-24.

At the close of appellants' case on the surcharge counterclaim the chancellor granted Mercantile's motion to dismiss under Rule 535. In reversing that ruling we pointed out that such a motion tests the legal sufficiency of the evidence. We then discussed the evidence adduced by the appellants on each of their theories of breach of trust. We said:

"In the case before us the contentions of the appellants cover the full range of breach of fiduciary duty, from bad faith and self dealing, to precipitous action, lacking the required diligence, and taken by the exercise of poor and uninformed judgment and without exploiting potential offers to buy at a higher price.

* * *

"We lay aside 'self dealing' in the strict sense. Appellants misuse the term, we think, in characterizing Mercantile's actions. When a person, natural or corporate, is a party to or otherwise profits from a transaction with a trust or other estate of which he is a fiduciary, as when he buys from or sells to the trust, or acts as a broker in the sale, he is self dealing. The courts generally hold that such a transaction, in the absence of full disclosure and consent of all beneficiaries, is voidable by the beneficiaries, with no need to show unfairness. *McDaniel v. Hughes*, 206 Md. 206, 111 A.2d 204 (1955); *Schockett v. Tublin*, 170 Md. 117, 183 A. 521 (1936); *Mangels v. Tippett*, 167 Md. 290, 173 A. 191 (1934).

"Mercantile did not buy the Pimlico Race Track property from the Hammond Trust, nor otherwise profit from the sale, except for its commissions as trustee. The sale did not involve any self dealing.

"Appellants point to evidence that several members of the Board of Directors of Mercantile had other connections which, appellants contend, showed or raised a presumption that each was subject to conflicting interest which destroyed or impaired his ability to act in the best interest of the Hammond Trust.

"Charles E. Rieman was the president of Western National Bank, which was the Jockey Club's principal depository, and which at times made substantial loans to the Jockey Club.

"F. Granger Marburg was a partner in the brokerage firm of Alex. Brown & Sons, and as such was a partner of W. Wallace Lanahan. Mr. Lanahan was a member of the board and executive committee of the Jockey Club, and was one of the Jockey Club's two negotiators for the purchase of the Pimlico Race Track. There was also evidence to indicate that Alex. Brown & Sons owned 350 shares of stock of the Jockey Club, but there was further evidence that the stock had been acquired for Alfred Gwynn Vanderbilt and had been transferred to him.

"Edwin F.A. Morgan was a partner in the law firm of Semmes, Bowen and Semmes, and as such was a partner of Lawrence Perin, and shared with him in the fees received by the law firm for its representation of the Jockey Club. Mr. Perin was a member of the board and executive committee of the Jockey Club, and was the Jockey Club's other negotiator for the purchase of the Pimlico Race Track.



"J. Edward Johnston personally owned 100 shares of stock of the Jockey Club.

"Messrs. Rieman, Marburg, Morgan, and Johnston were members of Mercantile's board of directors. Messrs. Rieman and Johnston were members and Messrs. Marburg and Morgan were associate members of the executive and of the trust investment committees.

"There was evidence that Mercantile held, in various trusts or in agency accounts, some 950 shares of stock of the Jockey Club. Mr. Vanderbilt owned a majority of the Jockey Club's 4,540 outstanding shares.

"The evidence showed that in 1946 a question which had become of significant importance was the adequacy of the physical facilities at Pimlico, and the feasibility of improving them, or of moving to a different location. The then current lease would have expired in 1949. The Jockey Club suggested that it would purchase the property from Mercantile, and suggested a price of $700,000.00. Mercantile informed Mrs. Madden, the life beneficiary, who was then thought by some to be the sole party in interest, because of her renunciation of the power of appointment in her father's will. Her personal attorney was also kept informed. She declined to consider the offer of $700,000.00.

"Later in 1946 Mercantile arranged to have a Mr. Gilbert, a well known real estate appraiser in Baltimore, appraise the land. He valued it at $540,000.00. A Philadelphia engineering firm, suggested by Mrs. Madden's attorney, made a study primarily to determine what it would cost the Jockey Club to relocate its racing operation, and to duplicate Pimlico's physical facilities at a new location. One of the conclusions of that study was that the

improvements at Pimlico could be reproduced new at a cost of approximately $1,600,000.00, and that their current depreciated value was $1,000,000.00. Mercantile noted that the value of the Pimlico property, at least by one approach, was indicated to be $1,540,000.00.

"Mercantile also approached the question of value in other ways. It made studies by capitalizing rents, adjusted for what it considered to be valid factors, using several different assumed rates of return. Possible values ranged up to a figure in excess of $2,000,000.00. There was other evidence at the trial indicating even higher values. Mercantile concluded that $1,500,000.00 was a reasonable value. It put that figure to the Jockey Club as an asking price.

"Other factors affecting value which were shown by the evidence were that the Jockey Club, not the trust, owned the names of several well known stakes races run at Pimlico, most famous of which was the Preakness. The Jockey Club, not the trust, was the licensee for conducting horse racing at Pimlico. State laws then in effect froze major racing at mile tracks in Maryland at the existing four locations, so that each party was, in many ways, compelled to deal only with the other.

"The General Assembly session of 1947 saw indications of change. A bill was introduced which would authorize any of the four major licensees to conduct racing at a different location, but which would still limit the number of licensees to four. The parties met as adversaries in the lobbies and halls of the State House. Intensive lobbying activities were conducted on behalf of each. As the session was nearing its end, the lobbyists for Mercantile were successful in bringing about an amendment [the Miles Amendment] to the bill which would permit a licensee



to relocate, but would then permit racing at five locations. The amendment was passed by the Senate on second reading by a vote of 15 to 13.

"It was clear that if that amendment became a part of the law, the owner of Pimlico Race Track would have to deal with a tenant which had alternatives. The Jockey Club could stay, under a new lease, or it could relocate. If it relocated, the trust would be required to seek another operator, one which could obtain a license, and which could then conduct horse racing at Pimlico. Pimlico would then be one of five, rather than four, major tracks in Maryland. If the amendment failed of final passage, the owner of Pimlico would have little more than a piece of real estate, appraised at slightly over one half of a million dollars.

"Before the Senate Bill came up for third reading, a memorandum of agreement was reached by negotiators for the Jockey Club and Mercantile. The Jockey Club would buy the property for $1,115,000.

"There was evidence that Mercantile did little or nothing to find or interest other possible purchasers. There was evidence that it did little or nothing to exploit indications of interest from other sources.

* * *

"[T]here was evidence at the trial which, viewed most favorably to the counter-complainants, coupled with reasonble inferences from the evidence, could have permitted a trier of fact to find the fair value of the asset sold to be within a wide range of indicated values. There was evidence from which a trier of fact could find that Mercantile used due diligence and exercised good judgment under all the circumstances, but the evidence would likewise permit finding that Mercantile failed to use the required diligence and

good judgment in selling the trust asset. There was evidence of potential for conflicts of interest, from which a trier of fact might infer that conflicts did, or might infer that they did not, result in a less than adequate price by affecting the quality of diligence and judgment with which the sale was made.

* * *

"*In short, the critical decision in this case was for the trier of the facts*, and could not be resolved on the basis of sufficiency as a matter of law. We hold that the chancellor erred in granting Mercantile's motion to dismiss." (Emphasis added.) 27 Md. App. at 32-36, 40-41.

After remand for further proceedings, the chancellor permitted the counter-complainants to reopen their case on a restricted basis as follows:

"[T]he petition of the counter-complainant, Peter Madden, to proffer newly-discovered evidence and the petition of the other counter-complainants to reopen their case in chief for the purpose of the introduction of additional evidence is granted, i.e. the counter-complainants shall be permitted to reopen their case in chief at the resumption of trial for the purpose of offering the following into evidence: One, evidence with respect to valuation of Pimlico Racetrack, including without limitation, expert testimony and documentary evidence. Two, evidence of—strike that—evidence bearing on the issue of laches in bringing the within action. Three, evidence relating to the release of the power of appointment by the life tenant of the trust. Four, further testimony from Mr. Frederick and Mr. Opie, and five, evidence as to the identification of the true or real owners of the stock of the Maryland Jockey Club, held by Mercantile-Safe Deposit and Trust Company or its



then predecessor, in the name or names of a nominee or nominees.

"This ruling in no manner relates to the admissibility into evidence of any items covered in the foregoing categorical descriptions, but bears only on the right of the counter-complainants to reopen their case in chief for the purpose of offering evidence within those categories.

"Except to the extent provided expressly by the foregoing ruling, the counter-complainants may not reopen their case in chief."

After both sides had introduced such evidence as they desired, the trial judge found that Mercantile used due diligence and exercised good judgment under all the circumstances and that the alleged conflicts of interest did not result in Mercantile obtaining a less than adequate price for the property. As we indicated in our prior opinion, there was already in the record sufficient evidence to support these findings. Nothing produced on retrial has altered this situation. Therefore, we are required under Md. Rule 1086 to affirm. In ordinary circumstances we would terminate this portion of our opinion at this point. In view of the extraordinary expense and effort devoted by the parties to these proceedings, we will discuss the appellants' specific argument briefly.

## BREACH OF TRUST

In our prior opinion the major question before us was whether the appellants had adduced sufficient evidence to survive a motion to dismiss under Md. Rule 535. Such a motion tests the legal sufficiency of the evidence and requires that it be viewed in the light most favorable to the non-moving party. In the present appeal, we are called upon to review the chancellor's findings of fact and his application of the law to those findings. The scope of our review is now governed by Maryland Rule

1086 which requires that we view the evidence and all reasonable inferences drawn therefrom in the light most favorable to the prevailing party and that we affirm the decree unless we find the chancellor's factual conclusions clearly erroneous or that he misapplied the law. If there was substantial evidence presented which supports the chancellor's findings they must be affirmed. *Delmarva Drill Co., Inc. v. Tuckahoe Shopping Center, Inc.*, 268 Md. 417, 302 A.2d 37 (1973); *Moon v. Weeks*, 25 Md. App. 322, 333 A.2d 635 (1975).

Appellants' major contention is that the Trustee, Mercantile, breached its duty to the Hammond Trust in the sale of Pimlico because it acted with divided loyalty, in that it held in other fiduciary accounts a significant portion of the Jockey Club's stock; because certain of its directors had interests conflicting with those of the trust; and because it failed to exercise the diligence and prudence required of it in marketing the racetrack. Through all of these allegations there runs a common thread: the question of the adequacy of the sale price. Each of appeallants' theories of breach of trust depends on whether the sale price was fair and adequate. Therefore, for the sake of convenience, we will discuss that aspect of the case first.

Much has been said in the briefs concerning the burden of proof relative to the fairness of the purchase price. In our view, the appellee has met the most stringent burden which the law applicable to this case has placed upon it. *Harlan v. Lee*, 174 Md. 579, 199 A. 862 (1938) provides us with the standard applicable where it appears that a fiduciary may have acted out of divided loyalty. In that case a single individual served both as executor of an estate and as trustee of one-third of the estate for the benefit of one of its three distributees. At a public sale, an undisclosed agent of the executor, acting for him in his capacity as trustee, purchased certain ground rents owned by the estate. Thus, the executor-trustee, acting in a dual fiduciary capacity, both sold and purchased the property. An objection to the validity of the sale was raised by those entitled to that share of the estate not subject to the trust. The Court held that where the



dual fiduciary was acting as a trustee, and not for his own account, the mere fact that he was both the seller and the purchaser of the property would not, of itself, invalidate the sale. The Court went on to point out that because there was also a claim that the asset was sold for an inadequate price, "the objection to the sale would be sustained if the executor failed to establish by a clear preponderance of testimony that the sales of the ground rents were fairly made, in good faith and for an adequate price." 174 Md. at 594.

Although the potential for conflicting loyalties in the present case is not as obvious and direct as it was in *Harlan*, we nevertheless conclude that such potential did exist and therefore we will apply the same burden of proof.[1] Thus, the relevant question, so far as proving the adequacy of the price is concerned, is whether it was shown "by a clear preponderance of the testimony that the [sale was] fairly made . . . and for an adequate price."

The evidence showed that in an attempt to ascertain the value of the land and improvements owned by the Hammond Trust at Pimlico, Mercantile obtained an appraisal of the land from one Harry E. Gilbert, a qualified real estate appraiser, and an estimate from the engineering firm of Day and Zimmermann of what it would cost to reproduce the improvements and various facilities then existing on the Pimlico property. Day and Zimmermann included a computation of the cost of replacing the Pimlico improvements less depreciation. The Gilbert

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[1]We hasten to point out that the transaction involved in the present case was perhaps less prone to have suffered from the effects of divided loyalty than was that described in Harlan, *supra*. In Harlan a single fiduciary (through an agent) acted as both purchaser and seller. In the instant case the evidence shows that the trustee participated in the sale of the Pimlico property only as the seller. The interests of the purchaser were represented by its officers. Mercantile purchased nothing for the accounts holding the Jockey Club stock. The purchase was made by the Jockey Club and any resulting benefit to those accounts would have been indirect and fragmentary.

appraisal together with the latter figure from Day and Zimmermann yielded an estimated value of land and improvements of $1,540,000.00. These reports were competent evidence of the fair market value of the Pimlico property and improvements owned by the Hammond Trust at the time of the sale. Appellants have attacked the reliability of the reports but their arguments go only to the weight to be given to the evidence. The chancellor was well within his discretion in relying on the figures compiled by Gilbert and Day and Zimmermann.

Evidence of value also included the testimony of Mr. Philip E. Klein, a qualified expert in the appraisal of real estate. Mr. Klein stated that in this opinion the 1947 value of the land and improvements at Pimlico, assuming its continued use as a racetrack, was $1,532,000.00. He further stated that the value of the property at its highest and best use other than for racetrack purposes was $532,000.00. Again, appellants attack Mr. Klein's testimony with arguments that go to its weight; but this was a matter for the chancellor to determine and we see no reason to conclude that he was erroneous in accepting, as he did, the testimony of Mr. Klein.

We come now to what is perhaps the most crucial consideration bearing on the value of the property sold. The evidence shows that in 1947 the Maryland Jockey Club was seriously considering moving its operations to a new location. A measure then pending in the legislature, Senate Bill 101, would have permitted such a move and very likely would have left Pimlico unavailable as a racetrack. The result would have been a substantial reduction in the value of the property, and the imminence of this threat would have had an injurious effect on the value of the property. The trustee fought the passage of Senate Bill 101 quite aggressively through the services of a highly regarded lobbyist hired for that specific purpose. An amendment [Miles Amendment] to the Bill, which would have permitted racing to continue at Pimlico if the Jockey Club had moved, was adopted on its second reading in the Senate by a margin of one vote. The war in the legislature was not won,



however, with the tentative adoption of the compromise amendment. The evidence was quite clear that opposition to the amendment was still strong and that numerable opportunities still existed for the adoption of Senate Bill 101 as originally proposed. It was under the threat of this legislation that Mercantile sold the property to the Jockey Club for $1,115,000.00.

In making their arguments, appellants completely downgrade the legislative situation and its effect on value. They overlook that the amendment had been adopted by one vote in the Senate and could easily have been removed before the legislature adjourned; in which event the Pimlico real estate would have been worth, according to one appraisal, only slightly more than half a million dollars. As pointed out in our prior opinion, even with the amendment the Jockey Club had the alternative to relocate and if it did so Mercantile would have been required to seek another operator who could obtain a license and conduct horse racing at Pimlico. In addition, Pimlico then would have been one of five, rather than four, major tracks in Maryland. In ignoring this situation, the appellants, and indeed their witnesses below, tend to grossly overvalue the assets which were sold.

We reject appellants' argument that in the valuation of land and improvements the chancellor failed to consider all elements of value owned by the Hammond Trust with respect to Pimlico. On the evidence presented, we have no basis to conclude that the chancellor committed error in excluding the various elements of value which appellants suggest were a part of the Hammond Trust assets. With respect to the alleged "good will" of the location and name of Pimlico, the chancellor remarked as follows:

> "Going now to some of the principal facts bearing on value, the evidence shows Pimlico had an excellent location. It shows that Pimlico was steeped in tradition, *but the imponderable question is how much of that tradition attached to the site or the name*

> *of the site and how much attached to the Maryland Jockey Club and the Preakness.* The evidence also shows that Pimlico's improvements were very old and, although well-maintained, they were obsolescent and well below standard for a modern racetrack operation in the post World War II era." (Emphasis added.)

On the evidence, the chancellor was not clearly wrong in concluding that this question was indeed "imponderable" and, accordingly, he was correct in excluding it from his determination of value.

Appellants' attempts at valuation consisted in the main of capitalizing the income earned over a number of years by the Maryland Jockey Club. Alternatively, they also capitalized rents paid by the Jockey Club to the Trust over a similar period. The chancellor was not required to rely on this method of valuation. *See Brinsfield v. Mayor and City Council of Baltimore*, 236 Md. 66, 202 A.2d 335 (1964); *State Roads Commission v. Novosel*, 203 Md. 619, 102 A.2d 563 (1954). The fact that the trustee was not selling a horse racing business as a going concern but simply the land and improvements where it was conducted was sufficient justification for the chancellor's decision to prefer Mercantile's approach over that of the appellants. It should be noted here also that the major part of the yearly rent was a percentage of gross earnings. Capitalization of the earnings of a business conducted upon land may reflect the efficiency of management and other aspects of the business operation rather than the value of the land itself. Accordingly, it is not always the most reliable method of valuation. In this case particularly there was evidence to indicate that the profitability of the business conducted by the Jockey Club was due to its tradition, management and assets rather than anything which the property owned by the trust may have contributed. There was also evidence that the years over which earnings were capitalized by appellants' expert were atypical and there was a serious question whether any racetrack business would continue on the site.



Appellants also attempted to prove value through reference to 1947 tax assessments and insurance valuations. Both of these figures were of doubtful worth in proving the market value of the property. As the chancellor noted, "they are at best hearsay opinions, and in this case we are not even certain, to some extent, whose opinions they are."

In view of the above discussion, which only summarizes the voluminous evidence contained in this record concerning value, we cannot say that the chancellor committed error in concluding that "the evidence is clear and convincing that the price was adequate."

Having established the validity of the chancellor's finding that the sale price was adequate, we now move to a discussion of the specific theories of breach of trust advanced by the appellants.

It is argued first that Mercantile owed a duty of complete loyalty to the Hammond Trust and that such duty was breached when the Trustee sold trust assets to a corporation in which it held approximately a 20% interest in other trust or fiduciary accounts. We note at the outset, as we did in our prior opinion, that this circumstance does not create a case of "self dealing" in the strict sense. The trustee did not deal with itself for its own advantage or profit from the transaction. Accordingly, we find the strict principles applied in self dealing cases are not applicable here. Appellant Cosden argues that because of this relationship, and because of the various direct and indirect relationships between directors of Mercantile and the Jockey Club in 1947, which we discuss below, the Trustee was required to prove not only the fairness of the sale but also that all the beneficiaries of the Hammond Trust were fully informed of all the facts concerning the property and the transaction and freely consented thereto. The case relied on for this proposition is *McDaniel v. Hughes*, 206 Md. 206, 111 A.2d 204 (1955), which, of course, is a self dealing case and, therefore, not applicable here.

The rule applicable to this situation is the more flexible standard used in viewing transactions between trusts with a common trustee. It is the same standard discussed in *Harlan v. Lee, supra*; that is, where a common fiduciary deals for and between two different trusts or fiduciary accounts the transaction will be sustained if it is shown to have been fairly made, in good faith and for an adequate price. This view is in accordance with that generally accepted by most authorities. *See French v. Hall*, 198 Mass. 147, 84 N.E. 438 (1908); *In re Binder's Estate*, 137 Ohio St. 26, 27 N.E.2d 939 (1940); *In re Rees' Estate*, 53 Ohio Abs. 385, 85 N.E.2d 563 (1949); *In re Saeger's Estate*, 340 Pa. 73, 16 A.2d 19 (1940); *Restatement* (Second) *Trusts*, § 170, comment r (1959); II Scott. *Trusts* (3d. ed. 1967) § 170.16; Prochnow, "Conflict of Interest and the Corporate Trustee," 22 Bus. Law. 929 (1967); Comment, "Corporate Trustees Conflict of Interest," 25 U.Chi.L.Rev. 382 (1958). The practical advantage of this approach is that it avoids imposing undue restrictions on business trustees which may handle a large number of trust accounts. There may be circumstances in which it is to the best advantage of two trusts to deal with each other even though they are administered by a common trustee. The instant case is a particularly good example of such a situation. The dangers of divided loyalty are sufficiently guarded against by imposing the burden on the trustee to prove that the transaction was made in good faith and for an adequate price as required by *Harlan v. Lee, supra.*

We have already expressed our view on the price issue. The evidence likewise supports the conclusion that the sale was made in good faith.

The record shows that the negotiations between the trustees and the Jockey Club, for the sale of the Pimlico property, were not merely at arms length but were indeed vigorously and hotly contested by both sides. It was the Jockey Club which approached the Trustee; first in 1938 with an offer to purchase Pimlico for $800,000, and then in 1946 with an offer to purchase for $700,000. Both of these offers were rejected. After the



second offer, negotiations continued and became progressively more serious. Mercantile employed Gilbert and Day and Zimmermann not only to determine the value of the assets in question but also the costs to the Jockey Club of relocating. This latter piece of information was used as a bargaining tool to demonstrate to the Jockey Club the advantage of remaining at Pimlico.

Mr. Henry A. Parr, III, an officer and director of the Jockey Club at the time in question, testified through deposition that the negotiations over the sale of Pimlico were hard fought on both sides. Mr. Lawrence Perin, who in 1947 was also a director of the Jockey Club and its chief attorney, testified at the trial that the position of Mercantile's president and chief Pimlico negotiator, Mr. Thomas B. Butler, was "adamant" and "hard boiled" with respect to the sale. Perin also testified that at the time he felt Mercantile was demanding too high a price for the property. We note further that the legislative situation described above also tends to support the wisdom and *bona fides* of the sale; especially when one considers the Trustee's efforts to fend off the threat posed by Senate Bill 101.

These references to the evidence are but a slight sketch of the mass of data contained in the record tending to show the fairness and good faith of the transaction. There is substantial support for the chancellor's findings that "the evidence . . . is clear and convincing that no conflicts, potential or otherwise, had any effect on the sale of the Pimlico land and improvements owned by the trustee . . .", and that, "there was no bad faith or disloyalty to the trust on the part of any employee, officer or director of the trustee."

Appellants next argue that the various direct and indirect relationships between certain of Mercantile's directors and the Jockey Club also created a conflict of interest affecting the adequacy of the purchase price and the good faith of the transaction. We have already pointed out that the chancellor was correct in concluding that the purchase price was adequate and we are likewise persuaded that he was correct in concluding

that the subject relationships had no effect on the transaction. His findings on this aspect of the case were as follows:

> "The evidence again is clear and convincing that no conflicts, potential or otherwise, had any effect on the sale of the Pimlico land and improvements owned by the Trustee.
>
> * * *
>
> "The direct testimony, none of which I found suspect, is that none of these relationships in any way was a factor in the negotiations or in the ultimate sale. It is clear from the evidence that *none of these directors* [Marburg, Rieman, Morgan, Johnston] *in any way participated in the negotiations or in the sale, or even in a formal approval of the transaction, at any stage*. . . . The actual decision was obviously made by the executive officers of the corporation without consultation with the Board of Directors." (Emphasis added.)

In light of these findings, which were amply supported by the evidence, and in light of our holding that the transaction was fairly made, in good faith and for an adequate price, we conclude that the bare relationships and the remote potential for conflicts shown by appellants, do not justify surcharging the trustee. *See Hammond v. Lyon Realty Co.*, 163 Md. 442, 163 A. 480 (1932); *Cumberland Coal and Iron Co. v. Parish*, 42 Md. 598 (1875); *Madden v. Mercantile-Safe Deposit and Trust Co.*, 27 Md. App. 17, 36-40, 339 A.2d 340 (1975); *Burlingham v. Worcester*, 351 Mass. 198, 218 N.E.2d 123 (1966); *Loud v. St. Louis Union Trust Co.*, 313 Mo. 552, 281 S.W. 744 (1926); II Scott, *supra*, § 170.10.

The appellants next argue that Mercantile did not make sufficient effort to market the property or to ascertain its true value and, as a result, failed to ask and obtain a sufficient price. Our conclusion that the price received was shown by the evidence to have been fair and adequate under the



circumstances of this case is sufficient to dispose of this contention. We shall discuss the other aspects of this point in order to demonstrate that the chancellor was also justified in concluding that there was no lack of due diligence in valuing or marketing the property sold.

The legal principles applicable to a contention such as this have been stated in several opinions of the Court of Appeals and were most recently summarized by us in our prior opinion in this case. Once again we will set them out briefly.

A trustee undertaking to sell the property of a trust has the duty to secure the fair market value of the property and to employ that degree of care, skill and judgment which a reasonably prudent man would exercise in the conduct of a similar sale. A conventional trustee is vested with a certain amount of discretion in making such a sale. "If a sale should be made by a conventional trustee in good faith and according to his best judgment, the sale will not be set aside unless there exists an inadequacy of price that, under the circumstances, is directly attributable to some failure of reasonable diligence or effort in the making of the sale." *Kramme v. Mewshaw*, 147 Md. 535, 548, 128 A. 468 (1925). Factors which will be considered in determining whether the Trustee exercised the requisite degree of diligence and care include its efforts to determine the value of the property sold, its method of offering the property and whether it closed the sale without endeavoring to obtain better bids. *Webb & Knapp, Inc. v. Hanover Bank*, 214 Md. 230, 133 A.2d 450 (1957). Where insufficient efforts have been made to ascertain the adequacy of the sale price a trustee's good faith in carrying out the transaction may not be sufficient to sustain its validity. *See Webb & Knapp v. Hanover Bank, supra; Knight v. Nottingham Farms, Inc.*, 207 Md. 65, 113 A.2d 382 (1955). The trustee need not, under all circumstances, seek the counsel and aid of real estate agents or advertise the property before its sale. *Kramme v. Mewshaw, supra*. As in the general management of trust assets, the trustee must exercise the care that an ordinarily careful man in his situation would exercise about his own

affairs; but he may not "adventure the trust assets as a business man might properly adventure his own." *Zimmerman v. Coblentz*, 170 Md. 468, 484, 185 A. 342 (1936).

The facts to which these general principles are to be applied in the present case were ably summarized by the chancellor:

> "Use of these experts—that is, Day and Zimmermann and Gilbert—to establish what was essentially a summation value or cost of reproduction new less depreciation, and as a guide to establishing the asking price for the property, cannot be faulted. Mr. Klein's opinion as to the value of the real property as improved and for use as a racetrack corroborates the soundness of the Trustee's valuation approach. There is no evidence of truly comparable sales to which the Trustee could have referred or to which we have been or could be referred. Constant reference to the sale of a little more than half of the stock in the Eastern Racing Association is not very helpful because that was not a sale of real property. There is no way, based on the evidence we have here, that one can utilize that sale as a comparable sale of racetrack real property. The same is probably true with respect to the sale of the Laurel stock. . . .
>
> "Going now to some of the principal facts bearing on value, the evidence shows Pimlico had an excellent location. It shows that Pimlico was steeped in tradition, but the imponderable question is how much of that tradition attached to the site or the name of the site and how much attached to the Maryland Jockey Club and the Preakness. The evidence also shows that Pimlico's improvements were very old and, although well-maintained, they were obsolescent and well below standard for a modern racetrack operation in the post-World War II era.



> "There was in 1946 and 1947 a very real possibility that Pimlico would move to another site and would be permitted to do so. The Maryland Jockey Club was seriously considering moving and, in spite of Mr. Mahoney's [2] testimony, in view of the public statements which had been made by the Maryland Racing Commission, no one could safely conclude at that time that the Maryland Racing Commission would block a move by the Maryland Jockey Club. Senate Bill 101, Section 7, as introduced in the 1947 Legislature, was intended and was understood by all as intended to permit the Maryland Jockey Club to move. No one in 1947 thought otherwise. It is also clear that the intention was understood to be that if the Jockey Club did move, Pimlico would no longer be available for use as a racetrack.
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> "*In view of these facts, the course of conduct undertaken by the Trustee in late 1946 and 1947 was not only proper, it was essential. Sound judgment was exercised. The Trustee was not only diligent; the Trustee was aggressive both in the Legislature and in its negotiations with the Maryland Jockey Club. The sales price finally arrived at was the result of hard-fought, arm's length negotiations in which the Trustee was seeking the highest price obtainable and the Maryland Jockey Club, on the other side, was seeking the lowest possible price.* The fact that the Trustee did not wring the last one hundred eighty-five thousand dollars of authority out of the Jockey Club negotiators in no way reflects adversely on the bona fides of the transaction, or the diligence of the Trustee, nor on the adequacy of the price.

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[2] This is a reference to Mr. George P. Mahoney who from 1944 to 1947 was Chairman of the Maryland Racing Commission.

"In addition to what has already been mentioned, there are reasons why the Trustee was, if not forced, at least well-advised to deal at least primarily, if not exclusively, with the Maryland Jockey Club. The Maryland Jockey Club not only held the license for racing at Pimlico, but had always held that license. The Trustee had neither a dead track to sell to someone interested in going into the racetrack business, nor did it hold a going concern which it could offer to one who wanted to buy a racetrack business. It held a racetrack which was under lease to the Maryland Jockey Club, who had the only available license to use that property for that purpose. Tangentially, there is no evidence in this case from which the Court could find or indeed indicating that the lease then extant was in any way an improvident lease.

"The conduct of the Maryland Racing Commission and the Legislature, at least prior to the Miles amendment of Section 7 of Senate Bill 101, clearly indicated that the Maryland Jockey Club held one of the only four licenses and was, stating it another way, one of the only four licensees for the operation of one mile tracks in Maryland. It seems clear that if the Maryland Jockey Club and Pimlico had parted company, the license would have gone with the Maryland Jockey Club and not to the successor in possession of Pimlico. Before the Miles amendment, no sane person could consider paying a racetrack price for Pimlico without being certain that he could get a license to operate it as a racetrack. Under these circumstances, there would appear to have been nothing which could have been gained from advertising a racetrack for sale or placing it with a broker for sale. In any event, the evidence shows that advertising was unnecessary. Similarly, it is understandable why the inquiries received by the Trustee



turned out, as the testimony tells us, in most instances to be just that—inquiries. The evidence shows no lack of diligence in pursuing these inquiries. The evidence is that they were followed up.

* * *

"When the Miles amendment to Section 7 of Senate Bill 101 passed, it cannot be disputed that the Trustee had won a major battle. At the same time, it cannot be disputed that the war was far from over. The Trustee could not safely take respite until the adjournment of that session of the Legislature, and that victory did not mean that the subsequent truce was a bad bargain for the Trustee. Anyone who has a rudimenary knowledge of the legislative process knows that until the bill is finally passed and sent to the Governor you don'tknow what is going to be in it, and until the legislative session ends you have no way of knowing what action is going to be taken with respect to any pending bills. *For the Trustee to have gone home from that session and rested on its laurels would have been to invite disaster. Even to have continued the battle vigorously with the hope of ultimate success does not seem to be a course of action that was prudent. Even under the Miles amendment, there are many questions as to what the value of the Pimlico Racetrack property, to the extent it was held by the Trustee, would be." (Emphasis added.)*

We shall not catalog the voluminous evidence upon which these findings were based, but deem it sufficient to state that we find them amply supported by the record. Application of the relevant legal principles to the facts just quoted supports the chancellor's conclusion that there was no lack of diligence in ascertaining the value of the property or in obtaining the best

price then available.[3] The Trustee had all the evidence of value before it which it needed to make a reliable estimate of the worth of the Pimlico property. We cannot say that it failed to exercise the degree of care required of it and by no means are we prepared to state that the chancellor was clearly wrong in so concluding. We have already concluded that the evidence supports the finding that the Trustee, through its officers, acted at all times in good faith and that the price received was fair and adequate.

We have addressed all of the appellants' contentions on the breach of trust issue which we will need to discuss and, as indicated, we find them without merit. We do not reach and do not decide any new questions that may have been raised in the reply briefs. Md. Rule 1031 c 5; *Hyde v. State*, 228 Md. 209, 218, 179 A.2d 421 (1962), *cert. denied*, 372 U.S. 945, 83 S. Ct. 938, 9 L.Ed.2d 970 (1963); *Jacober v. High Hill Realty, Inc.*, 22 Md. App. 115, 321 A.2d 838 (1974). Any other approach would be manifestly unfair to the appellees who do not have an appropriate opportunity to answer such arguments. Our conclusion that there was no breach of trust committed in the sale of the Pimlico property also disposes of the contention that Mercantile was not entitled to the 2% commission which it paid to itself in connection with the sale. *See Madden v. MercantileSafe Deposit & Trust Co.*, 27 Md. App. at 49.

## TRUSTEE'S COMMISSIONS

By decree of May 11, 1977, Judge Ross awarded commissions on the income and corpus of the trust and a final distribution commission of 1% as provided in *Md. Code*, Estates and Trusts Art., § 14-103. The 1% commission was to be

[3]The evidence is quite clear that there were no serious offers on acceptable terms other than that of the Jockey Club. As to the lack of formal advertising, it is clear that the publicity concerning the sale of Pimlico negated any need for it.



charged against the entire corpus and that portion of the award based on income and corpus commissions was to be charged ratably against the various shares held by Mercantile in trust from time to time since the death of the life tenant. The chancellor also authorized and approved the payment of $20,000 as a counsel fee for services rendered to the trustee.

All appellants noted appeals from this decree but only Audrey Cosden has presented an argument on the point. As the appellant notes, this portion of the appeal is concerned only with those commissions and fees authorized by the order of May 11 and does not involve any expenses in connection with Mercantile's defense of the counter-claimants' attempting to surcharge the Trustee, Mercantile. Cosden argues first that the Trustee breached its duty to make a prompt distribution of the corpus in failing to make partial distribution to her after the decree of May 30, 1973 ordered that she was entitled to one-fourth of the trust estate. She contends that there was no dispute as to her entitlement to at least that much of the estate.

The decree of May 30, 1973 upheld the legitimacy of Hallenbeck and Humphreys and determined the proportional share of the distributable corpus due to each beneficiary. Peter Madden entered an appeal from that decree to the Court of Appeals. *Madden v. Cosden*, 271 Md. 118, 314 A.2d 128 (1974). This appeal required the Trustee to continue to hold in trust the corpus as well as the accumulated income that would have been otherwise distributable to Hallenbeck and Humphreys. However, it did not challenge Audrey Cosden's right to at least 25% of the estate.

The Trustee petitioned the court for instructions as to further distributions on July 23, 1973. A hearing on the petition was held on November 21, 1973. The Trustee then had on hand undistributed income of about $49,000 and the principal of the trust estate amounting to about $3,045,000. By his decree of December 15, 1973, prior to the decision in the Court of Appeals, the chancellor directed retention of reserves by the Trustee for expenses and a partial distribution as follows:

(1) It ordered the Trustee to retain a portion of the principal of the trust as a reserve to secure reimbursement of the Trustee's reasonable expenses and compensation for its continued administration of the trust after January 4, 1972, exclusive of expenses incurred in the surcharge action. This was denominated "regular expenses and compensation." It also ordered the Trustee to retain a portion of the principal of the trust as a reserve for the Trustee's claimed reasonable expenses and compensation in defending the surcharge action. This was denominated "extraordinary expenses and compensation." A portion of this latter reserve was to be set aside from the principal of the trust estate as a whole, and the remaining portion thereof was to be set aside only from the distributive shares of Audrey Cosden, Peter Madden, Michael Madden and Christina Madden, who alone had prosecuted the surcharge counterclaim.

(2) It ordered the undistributed income collected since March 31, 1973, and future income, to be distributed one-fourth to Audrey Cosden, one-twelfth to each of Peter, Michael and Christina Madden, and one-fourth less one-sixth thereof, to each of Anne Hallenbeck and Jane Humphreys. The Trustee was authorized to retain the one-sixth of the income otherwise distributable to Hallenbeck and Humphreys on the theory that Peter Madden's appeal could adversely affect only one-sixth of the shares otherwise distributable to them.

(3) It ordered the balance of the principal of the trust to be distributed one-fourth to Audrey Cosden and one-twelfth to each of Peter, Michael and Christina Madden. This, of course, left the disputed one-half share undistributed.

After these partial distributions required by the order of December 15, 1973 were made, the trust continued as to the balance of the principal of the trust estate amounting to about $2,000,000.

The Court of Appeals affirmed the lower court's decree that Hallenbeck and Humphreys were legitimate daughters of the life tenant, the mandate issued on March 4, 1974, and on



March 11, 1974, these distributees petitioned for a distribution to them of portions of the corpus and income of the trust estate. By order dated March 14, 1974, the lower court directed the distribution to them outright of the principal and interest theretofore held for them in special accounts and periodically thereafter the income which would be derived from their shares of the reserves held for the Trustee's regular and extraordinary expenses and compensation. The Trustee distributed to each of these beneficiaries securities and cash having a then value of $592,921. After these distributions the Trust continued as to the principal of approximately $850,000 constituting the reserves held in five separate accounts until these accounts also were required to be changed by the lower court's order dated May 22, 1975.

We agree with appellant that a trustee has a duty, in winding up the administration of the trust, to make a reasonably prompt distribution of shares if it can do so without risk of loss either to itself or the beneficiaries. We disagree, however, with the contention that the delay in the distribution of appellant Cosden's share, under the circumstances of this case, required that the trustee be denied its commissions. The allowance of such commission is a matter largely within the discretion of the chancellor and the propriety of such an allowance depends on the particular facts of each case. The chancellor's determination in this respect will not be disturbed in the absence of an abuse of discretion. *Stone v. Stone*, 230 Md. 248, 186 A.2d 590 (1962); *Sokol v. Nattans*, 26 Md. App. 65, 337 A.2d 460, *cert. denied*, 275 Md. 755 (1975). This rule has been recognized by the authorities even where delay in distribution or other default on the part of the trustee has occurred but where there has been no bad faith or substantial loss to the estate. *See, Wasserman v. Locatelli*, 343 Mass. 82, 175 N.E.2d 914 (1961); *Katz v. Katz*, 104 N.H. 478, 190 A.2d 425 (1963); *In re Trusteeship of Stone*, 138 Ohio St. 293, 34 N.E.2d 755 (1941); Annot., 110 A.L.R. 566 (1937); 90 C.J.S. *Trusts*, § 407. There is no indication here that the delay in distribution was the result of bad faith or caused any substantial loss to the estate. Although appellant Cosden

makes such allegations in her brief, she points to no evidence sufficient to sustain them. The chancellor concluded that under the circumstances the trustee was entitled to a commission; he said:

> "With respect to Mrs. Cosden's suggestion that her share should have been immediately distributed, the usual practice is for a trustee to make one distribution of all assets to all beneficiaries entitled upon occurrence of the terminating event. Although in proper circumstances partial distribution may be made, and in some instances should be made, this is the rare exception and not the general rule. There is no basis in this case for penalizing the trustee for following the general rule rather than making an exception. . . ."

We have no basis on this record to disturb the chancellor's exercise of discretion.

In addition, Cosden complains because the trial court awarded final distribution commissions of 1% pursuant to *Md. Code*, Estates and Trusts Article, § 14-103(e) which provides as follows:

> "Upon the final distribution of any trust estate, or portion of it, an allowance is payable commensurate with the labor and responsibility involved in making the distribution, including the making of any division, the ascertainment of the parties entitled, the ascertainment and payment of taxes, and any necessary transfer of assets. The allowance is subject to revision or determination by any court of equity having jurisdiction. In the absence of special circumstances the allowance shall be equal to one-half of one percent upon the fair value of the corpus distributed."



Cosden alleges that there are no special circumstances upon which the court could grant the Mercantile final termination commissions double the amount set by statute. The argument is without merit. If the facts heretofore recited do not show special circumstances, we are unable to conceive of a situation in which special circumstances would exist.

Cosden next complains that the chancellor nevertheless "abuse[d] his discretion in not allocating the cost of Peter Madden's independent crusade in the ownership case to the interpleaded funds."[4] The Trustee Mercantile contends the question is not really presented. That portion of the record devoted to this question is meager. In the Cosden answer to the Trustee's petition she stated:

> "First: The majority of the time of the Trustee and its counsel was devoted to issues concerning the right of Mrs. Hallenbeck and Mrs. Humphreys to take their shares; and any unusual expenses should be assessed against their shares alone . . . That this respondent contends that the burden is upon Mr. Boyd [counsel for the Trustee] to satisfy the Court in the exercise of the Court's discretion of the exact nature of the services rendered, the time involved, his charges, the customary charges in the Baltimore community and the benefits which accrued to the estate as a result of his services and that no portion of the services relating to the right of Mrs. Hallenbeck and Mrs. Humphreys to take their shares be assessed against this respondent."

In her opening statement at the hearing on the question here discussed Cosden's counsel stated:

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[4]The "ownership case" was that portion of the controversy concerning the entitlement of Hallenbeck and Humphreys to a share in the estate.

"With regard to the ownership issue, my client has never made any claim to anything more than her 25% share of the trust assets. The determination of the 50% that was at issue should not fairly be charged to anyone other than that share itself. Indeed, I do not know why the separate shares could not have been distributed to those who were not in controversy or the trustee never really raised any question as to the fact that my client received 25%, and that the three Madden children would divide 25%.

* * *

"For Mrs. Cosden to be liable for any portion of the ownership costs would be really inconsistent with that which has been the general thought expressed in this Court and the Court of Special Appeals[5] that Mrs. Humphreys and Mrs. Hallenbeck should not be liable for any portion of the surcharge expenses in which they did not participate.

* * *

"With respect to the counsel fee, I perhaps am somewhat more generous than my brother attorney, Mr. Madden, as to what Mr. Boyd is entitled to, but I think that which he's entitled to should come exclusively from the shares of the person for whom with respect to which his services were rendered, namely, the termination of the ownership case. Outside of filing the petition and engaging in certain discussions pertaining to distribution of income, there are very few services that Mr. Boyd rendered in the case which did not fall exclusively within the

[5]Reference apparently to Madden v. Mercantile-Safe Deposit & Trust Co., 27 Md. App. 17, 48, 339 A.2d 340 (1975).



ownership case as to whether Mrs. Hallenbeck and Mrs. Humphreys should take or do not fall within the area of problems created by the fact that the trustee has, for its own benefit, sought to retain assets for its own benefit and protection. It may have a legal right to do so, but it should not result in an additional charge to the beneficiary. Accordingly I feel that no portion, or at worse, only a very token or nominal fee should be charged against Mrs. Cosden."

At the same time with reference to this issue Peter Madden (appearing in proper person) said:

"Now, on the matter of allocation, I'm unaware that this has been raised by the trustee. It is apparently raised by Hallenbeck, Humphreys and Cosden, and they would like to have me pay all of the bills. For reasons which I have stated before, there was mutual benefit in the ownership proceeding from the point of view of at least the counter-claimants on the matter of the validity of the Nevada divorce, which was upheld by the highest court of the State of Maryland, which then made the adoption disinheritance issue no longer viable for the trustee to use, but also to find out who the owners were so that there would be no gift tax liability."

Thereafter Mrs. Cosden's counsel stated:

"Your Honor, I would like to clarify one point where I may have misled Mr. Madden. Mrs. Cosden's petition on the allocation point is solely that the shares which were involved in the allocation or in the ownership case, should bear the expense, namely, Mrs. Humphreys and Mrs. Hallenbeck. While we did not agree with Mr. Madden's attack on the shares of his aunts, we do feel that he proceeded in good faith and with a sufficient measure of justification."

Cosden argues that in *Hitchens v. Safe Deposit & Trust Co. of Baltimore*, 193 Md. 62, 66 A.2d 97 (1949), the Court of Appeals held that a trust beneficiary should not be required to bear the costs of the trustee's defense in a suit between other beneficiaries. In *Hitchens* the Court costs were ordered to be paid out of the only share of the estate which could have been affected by the appeal. With respect to the ownership aspect of this controversy the amount to which Audrey Cosden would have been entitled was in issue even on appeal. Had Peter Madden ultimately succeeded in defeating the claims of Hallenbeck and Hamphreys, Mrs. Cosden's share in the estate would have increased to one-half instead of one-fourth. Further, the chancellor's allocation of costs and expenses is not inconsistent with the view we took in our prior opinion relative to Hallenbeck's and Humphrey's lack of responsibility for the costs of the surcharge case. Those parties formally renounced and disclaimed any interest which they might have had in a surcharge recovery and, therefore, their shares would not be affected by the result either below or on appeal. The same cannot be said concerning appellant Cosden in the ownership case. In any event, we see no abuse of discretion in the trial judge's decision that the costs of the ownership case should be borne by all of the beneficiaries in these complex proceedings.

## COUNSEL FEES

In the order of May 11, 1977, the trustee was allowed $20,000 for legal services rendered by its counsel. At the hearing to determine the amount of such fee, appellants sought to examine Mercantile's attorney under oath. The chancellor refused to permit such examination stating his reasons as follows:

> "I have expressed my opinion on that subject for sometime, or many times, and it is very simply this: That every member of the bar of this Court is an officer of this Court, and I do not intend to become a part of any body of law which says that I cannot rely



> on statements of counsel as to their truthfulness, and I refuse to take part unless specifically directed by the Court of Special Appeals and the Court of Appeals, either by rule or decision to permit an adversary to call an adversary attorney to the witness stand and cross examine him, and to me it is the beginning of the end of our common law adversary proceeding, and it is the beginning of the end to the dignity and decorum of the administration of justice as I have come to know it, and it is an exacerbation of the public image of the law or an exacerbation of the diminution of the image of the bar in the eyes of the public, and certainly in this proceeding, knowing the parties to this proceeding and knowing what has happened in the past in these proceedings, I am not about to exercise what I consider to be my clear discretion to force any attorney to take the witness stand and be subject to cross examination unless he voluntarily wishes to do so. If he wishes to take the stand, then he's subject to cross examination, but the law, as I understand it, is clear that on an application for allowance of counsel fees, the court has broad discretion as to what it will consider, and it has broad discretion as to the manner in which the proceedings shall be held, and the tradition which has been expressly approved by the Court of Appeals and the Court of Special Appeals in a vast majority of the cases is that the application is made and determined in petition on behalf of the petitioner seeking the allowance.
>
> "I have seen no reason up to this point why that method of proceeding is not perfectly appropriate in this case. If what you're doing is asking Mr. Waxter to take his turn at protecting the record on that point, fine.
>
> "(Mr. Prem) [Counsel for Mrs. Cosden] Do I understand Your Honor to rule that we have no right of cross examination of Mr. Boyd?

(The Court) You can't cross examine a witness who is not taking the stand. That's simple. You can go back to McCormick on that. It's a matter of the law of evidence. You don't cross examine someone who is not on the witness stand. That's very easy.

"As I have indicated, then very shortly we will get to the point where I will hear Mr. Boyd [the Trustee's attorney for whose services compensation was being sought] explain why the facts set forth in his petition entitle him to the fee which he has stated he feels he is entitled to. You will have, as will Mr. Waxter and Mr. Madden, an opportunity to respond to that if there are questions that come up in the course of that examination and in the course of what I have described, not to formalize these proceedings to the point of making it a trial, but during the course of what I have classified as closing argument, I'm sure that there will be questions asked which might be in the nature of cross examination, but they won't be your asking Mr. Boyd questions. There will be questions that you raise that I may want to ask Mr. Boyd about, which I'm sure he will answer and may elaborate on, but there will be no formal cross examination of Mr. Boyd for the reasons that I have previously indicated."

Shortly after this statement by the chancellor Mr. Boyd made his closing argument on the issue of attorney's fees. The record extract does not reveal whether any questions were propounded to him as suggested by the court.

We have found no authority for the proposition that an attorney cannot be examined as to the propriety of a fee which must be approved by a court. Although the question was raised in *Sokol v. Nattans, supra*, it was not decided because the record furnished on appeal was inadequate. It is clear that in a case such as this some evidence must be presented which supports the reasonableness and necessity of the legal fees being claimed. The award was based in part on the chancellor's own observations and familiarity with the case, and on documentary



evidence prepared and submitted to the court by Mr. Boyd which purported to reflect the time and effort he had devoted toward advising Mercantile on the administration of the trust estate. Of course, where a claimed fee is challenged by an adverse party, he must be given the opportunity to rebut whatever evidence has been produced in support of the fee. It appears to us that the most natural and logical way to utilize that opportunity in this case was through the examination of Mr. Boyd. We do not share the chancellor's concern that allowing such an examination would be an affront to an attorney as an officer of the court. Rather, allowing such an attorney to be examined by the adverse party merely recognizes that party's right to present his case through competent and material witnesses. We think the fears expressed by the chancellor were unfounded and appellants should have been given the opportunity to examine Mr. Boyd. Although it may be somewhat indecorous, such an examination is necessary where the fee is in dispute and the adverse party demands it.

Appellee argues that if error was committed by the chancellor in refusing to allow the examination of Mr. Boyd, such error was harmless. We are unable to agree with this contention because such an examination may have elicited facts which would have affected the chancellor's exercise of discretion in making an award of attorney's fees. The appellants are hardly in a position to make a proffer of what such an examination might bring forth. We will, therefore, modify the decree insofar as counsel fees were allowed and remand the case for further proceedings on that point alone.[6]

*Decrees affirmed except as to counsel fee allowed in decree of May 11, 1977.*
*Case remanded for further proceedings as to counsel fees.*
*Appellants to pay costs.*

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[6]There are a number of motions pending in these proceedings on which the Court has not specifically ruled. The motions which will not become moot by our mandate are denied.

MANDATE OF MARYLAND COURT OF SPECIAL APPEALS

DATED APRIL 12, 1979

## MANDATE

**Court of Special Appeals of Maryland**

**No. 796 September Term, 1977**

AUDREY COSDEN ET AL

VS.

MERCANTILE-SAFE DEPOSIT AND TRUST COMPANY, TRUSTEE, ET AL

March 7, 1979—Opinion by Thompson, J. Decrees affirmed except as to counsel fee allowed in decree of May 11, 1977. Case remanded for further proceedings as to counsel fees. Appellants to pay costs.

April 6, 1979—Motion for Reconsideration filed by appellant, Peter Madden.

April 10, 1979—Motion for Reconsideration denied.

April 12,1979—Mandate issued.

**STATEMENT OF COSTS:**

In Circuit Court: for Baltimore City

| | |
|---|---|
| Record | 75.00 |
| Stenographer's Costs | 19,318.25 |

In Court of Special Appeals:

Filing Record on Appeal ..... 30.00

Printing Brief for Appellants (Cosden = $1,714.65) (C&M. Madden = 61.90)



Printing Brief for Appellant Peter Madden = $7,903.92

Portion of Record Extract—Appellants ..... 81,151.22

Printing Brief for Cross-Appellee .....

Reply Briefs ..... (C. Madden=326.30) (M. Madden=326.30)

Reply Briefs ..... (Cosden=229.30) (Peter Madden=1,447.40)

Printing Brief for Appellee ..... 4,371.60=Mercantile

Portion of Record Extract—Appellee ..... 7,558.00=Mercantile

Printing Brief for Cross-Appellant .....

*STATE OF MARYLAND, Sct:*

*I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Special Appeals.*

*In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Special Appeals, this twelfth day of April, A.D. 1979*

/s/ Howard E. Friedman

*Clerk of the Court of Special Appeals of Maryland*

Costs shown on this Mandate are to be settled between counsel and NOT THROUGH THIS OFFICE.

## ORDER OF MARYLAND COURT OF SPECIAL APPEALS DATED APRIL 10, 1979 DENYING MOTION FOR RECONSIDERATION

(Filed April 10, 1979)

COURT OF SPECIAL APPEALS
OF MARYLAND
Annapolis, Md. 21401
TELEPHONE 269-3646

HOWARD E. FRIEDMAN
CLERK

DAVID L. TERZIAN
CHIEF DEPUTY

THAYER A. LARRIMORE
DEPUTY

April 11, 1979

Peter H. Madden, Esquire
Box 609
New York, New York 10022

Re: Audrey Cosden et al. v. Mercantile-Safe Deposit and Trust Company, Trustee et al.
No. 796, September Term, 1977

Dear Mr. Madden:

Your motion for reconsideration was denied by the Court on April 10, 1979. The mandate in this appeal will be issued April 12,



1979, and at that time, the record will be returned to the Clerk of the Circuit Court of Baltimore City.

Very truly yours,

/s/ Howard E. Friedman
Clerk

HEF/nze

cc. Mr. Ronald J. Wiley, Clerk
H. Vernon Eney, Esquire
Clarke Murphy, Jr., Esquire
Peter Parker, Esquire
J. Cookman Boyd, Jr., Esquire
Rignal W. Baldwin, Esquire
Robert C. Prem, Esquire
Michael J. Madden
Ms. Christina L. Madden
Diana G. Motz, Esquire

## OPINION OF BALTIMORE CITY CIRCUIT COURT
## DATED AUGUST 6, 1976

In the Circuit Court of Baltimore City

Mercantile-Safe Deposit & Trust
Company v. Audrey Cosden, et al.

Peter H. Madden, et al. v. Mercantile-Safe
Deposit and Trust Company—112A/382-455/A52662

(Filed June 9, 1977)

(T.87—2) August 6, 1976

**PROCEEDINGS**

(The Court) I see Mr. Parker apparently could not make arrangements for his flight. I suppose it is somewhat an unusual circumstance in which none of those who tried the case on behalf of the Counter-Complainants are present to hear the decision of the Court. In connection with that, of course, they were excused or given leave not to be here, so there is no problem on that score. I might perhaps reiterate at this juncture, so that the record is clear, my reasons for not granting Mr. Madden's request to postpone the decision until some point in time several weeks hence to permit him to prepare and file a written memorandum. I cannot recall that I have ever refused such a request in the past, and I think it is seldom that a request of that nature is refused. However, for the reasons I stated at the time we discussed his request, I do not feel that it would be appropriate or proper, in this case to grant that relief, and I was particularly brought to that conclusion when Mr. Madden described to me the nature of the brief he was preparing.



As I indicated that day during the general discussion, and I may or may not allude to it again in the course of my explanation of the reasons for my decision, I am not a financial analyst nor an accountant, and I do not profess to have any expertise with respect to matters financial. I (T.87—3) am a lawyer, and I am therefore required to rely on the opinions of experts in this field, and to the extent that my decision is based on financial matters concerned in this case I have to rely on the opinions of the experts who testified at trial. Based on the presentations Mr. Madden has made in the past and the nature of the presentation he indicated would be contained in his brief, and also based in some measure on his closing argument, it is clear to me that what he intends to do is not make written argument with respect to the conflicts in testimony of the expert witnesses in this case, but present his argument based on his presentation of financial data. I have examined and considered all of the financial presentations in this case up to this point. I can't believe that any further presentation would in any way affect my decision in this case, so that I saw no useful purpose to be served by the additional brief on that point. I encouraged Mr. Madden, both at the conclusion of the evidence and prior to the conclusion of evidence, and at the beginning of argument, to make his presentation orally. I was, frankly, surprised that he chose to follow the course of action he did and leave at the close of his oral argument—that is, at the end of his presentation—and not return for the balance of oral argument, in spite of the fact that I had indicated to him it was oral argument and not written briefs that would be considered in making the decision. After Court adjourned yester-(T.87—4) day, I requested my secretary to telephone Mr. Madden at the telephone number he had left with the Clerk of the Circuit Court. She reached him and on my instructions she informed him that I would announce the decision this morning and state my reasons. His response was he did not think he would be here. He was in New York, and it is apparent he is not here.

The principal function of the statement of grounds for decision, as I understand it, is to indicate to the parties that the

Court has considered fully their arguments and contentions and the evidence in the case, and also to give some guidance to the appellate court in the event of appeal as to why the decision was made. In view of the length of this trial and the volume of the evidence, I shall make no effort to review or summarize all of the evidence. What I shall do is state the basic findings and in sort of general, maybe not outline form, but generally sketch the underlying reasons for those findings.

All agree that the ultimate issue in this case is the adequacy of the price for which the Trustee sold Pimlico Racetrack to the Maryland Jockey Club in 1947. The evidence is clear and convincing that the price was adequate.

The other principal issue in the case is that with respect to conflicts of interest and whatever potential may have existed for conflicts. The evidence again is clear and convincing that no conflicts, potential or otherwise, had (T.87—5) any effect on the sale of the Pimlico land and improvements owned by the Trustee. There was no bad faith or disloyalty to the trust on the part of any employee, officer or director of the Trustee. There was no lack of diligence or failure to exercise sound judgment by the Trustee. The evidence from the Trustee's files shows that the Trustee was fully informed and carefully considered all important factors bearing on the transaction.

With respect to the value of the property sold, the Counter-Complainants attempted to show that the price was inadequate by two principal methods; one by expert testimony, the other by documentary evidence found in the files of the Trustee. The principal approach, if indeed not the sole approach of the Counter-Complainants, from the very outset and apparently even after the decision of the Court, is on capitalization of earnings arising out of the operation of the racetrack. Even if capitalization of earnings of a business enterprise is a proper method for valuing real estate, I cannot accept Mr. Walker's opinion, either as to the value of the hypothetical entity that he undertook to value or with respect to the real property sold by the Trustee.



As I indicated at the outset, I am not a financial analyst and, therefore, must rely on expert opinion. As between Mr. Walker and Mr. Kovach there is no real contest. I have carefully considered Mr. Kovach's relationship to the (T.87—6) Mercantile-Safe Deposit and Trust Company, which was emphasized by the Counter-Complainants, and based on my observation of Mr. Kovach on the stand and the content of his testimony I have no doubt that his opinion was an honest one. Mr. Walker's analysis of the financial data, the process that he used to arrive at his conclusions, seemed to me to be artificial in large measure and, indeed, in some instances, forced. On the other hand, I was impressed by the realistic approach taken by Mr. Kovach. His presentation and his analysis made a great deal more sense to me than Mr. Walker's.

I am not going to attempt to analyze in detail or compare in detail their approach, but I think the important aspect, and certainly that which influenced me the most, was the dealing with historical earnings. Mr. Kovach rejected historical earnings because of the unusual nature of the several years immediately preceding the year of the sale. That was understandable and is consistent with my limited knowledge of matters of this nature. Mr. Walker's attempt to reconstruct each of those four or five years preceding the date of sale didn't make good sense, and it resulted in artificiality, and I would agree with Mr. Kovach is a fruitful source of error.

Again, Mr. Kovach's approach in his analysis of value of the corporations treated as comparables or the stock of the corporations treated as comparable with respect (T.87—7) to financial data available to investors was much more realistic than Mr. Walker's. I am certain, and it is only common sense, that an investor attempting to place a value or make a buy or sell decision with respect to stock of the comparable corporations at March 21, 1947 would utilize all information available at that time, and would not be bound, as Mr. Walker would want to bind us, to published certified statements of the age that he utilized in making his comparisons and arriving at his multiplier. Again, it seemed to me to be only common sense

that the utilization by Mr. Kovach of the comparable racing years rather than what Mr. Walker called the comparable fiscal years was much sounder. It is highly doubtful that capitalization of earnings is a permissible method for valuing real property. The law of Maryland certainly indicates that it is not acceptable. There is expert evidence in this case that from a business appraisal standpoint it is not acceptable, but even if it is a permissible means of valuation, certainly as applied in this case to a hypothetical or a mythical business entity it has to be subject to very serious question.

In any event, accepting Mr. Kovach's opinion as the sounder of the two, even this method of valuation casts no doubt on the adequacy of the price for the sale of the property in question. Considering all of the circumstances, the value analysis made by the Trustee, with the aid of Day and Zimmermann and Gilbert, was a perfectly reasonable and (T.87—8) sound one. From all of the evidence, it is clear that Mr. Gilbert was highly regarded and no one has really challenged his appraisal, except perhaps Mr. Walker, who questioned the absence of a factor for the cost of assemblage, a concept which was challenged, as I recall it, by Mr. Klein. Similarly, all of the evidence indicates that Day and Zimmermann was highly regarded, and their analysis hasn't been seriously challenged. Even Mr. Walker seems to give weight to Day and Zimmermann, although he protested that it was all he had for certain items and therefore he used it, but the lower end of his range of value of the improvements on the real property coincides with that established by Day and Zimmermann.

Use of these experts—that is, Day and Zimmermann and Gilbert—to establish what was essentially a summation value or cost of reproduction new less depreciation, and as a guide to establishing the asking price for the property, cannot be faulted. Mr. Klein's opinion as to the value of the real property as improved and for use as a racetrack corroborates the soundness of the Trustee's valuation approach. There is no evidence of



truly comparable sales to which the Trustee could have referred or to which we have been or could be referred. Constant reference to the sale of a little more than half of the stock in the Eastern Racing Association is not very helpful because that was not a sale of real property. There is no way, based on the evidence we have here, that one (T.87—9) can utilize that sale as a comparable sale of racetrack real property. The same is probably true with respect to the sale of the Laurel stock, since again it involved sale of stock in a corporation and not the sale of real property, but certainly, taking the purchase price of the Laurel stock at a little over a million dollars, and considering all of that as bearing or indicating any value of the Laurel Racetrack, the evidence is certainly not inconsistent with the sales price of Pimlico property. I don't think there is any doubt from the evidence in this case that the sales price was the million dollar plus figure, and not the two and a half milion dollar figure appearing in the two newspaper articles. Whether Mr. Butler or anyone else at the Trustee knew what the actual price involved in this case was, we don't know, but I don't see how, even if we are to assume that he had read the articles and thought the Laurel property had sold, or the Laurel stock had sold, for two and a half million dollars that we could say it affected his judgment or diligence in any way. Based on all the evidence, I would infer that if he was aware of this sale and if he did consider it, as the astute businessman he was described by everyone as having been, he would have fully explored it, and if he was successful in his investigation he would have come up with the facts that we now have in the record. If he was unsuccessful, then, as a sound businessman, he would have to reach the conclusion that (T.87—10) he doesn't know what the two and a half million dollars means and, therefore, he can't utilize it effectively.

Going now to some of the principal facts bearing on value, the evidence shows Pimlico had an excellent location. It shows that Pimlico was steeped in tradition, but the imponderable question is how much of that tradition attached to the site or the name of the site and how much attached to the Maryland

Jockey Club and the Preakness. The evidence also shows that Pimlico's improvements were very old and, although well-maintained, they were obsolescent and well below standard for a modern racetrack operation in the post-World War II era.

There was in 1946 and 1947 a very real possibility that Pimlico would move to another site and would be permitted to do so. The Maryland Jockey Club was seriously considering moving and, in spite of Mr. Mahoney's testimony, in view of the public statements which had been made by the Maryland Racing Commission, no one could safely conclude at that time that the Maryland Racing Commission would block a move by the Maryland Jockey Club. Senate Bill 101, Section 7, as introduced in the 1947 Legislature, was intended and was understood by all as intended to permit the Maryland Jockey Club to move. No one in 1947 thought otherwise. It is also clear that the intention was understood to be that if the Jockey Club did move, Pimlico would no longer be available (T.87—11) for use as a racetrack.

In view of these facts, the course of conduct undertaken by the Trustee in late 1946 and 1947 was not only proper, it was essential. Sound judgment was exercised. The Trustee was not only diligent; the Trustee was aggressive both in the Legislature and in its negotiations with the Maryland Jockey Club. The sales price finally arrived at was the result of hard-fought, arm's length negotiations in which the Trustee was seeking the highest price obtainable and the Maryland Jockey Club, on the other side, was seeking the lowest possible price. The fact that the Trustee did not wring the last one hundred eighty-five thousand dollars of authority out of the Jockey Club negotiators in no way reflects adversely on the bona fides of the transaction, or the diligence of the Trustee, nor on the adequacy of the price.

In addition to what has already been mentioned, there are reasons why the Trustee was, if not forced, at least well-advised to deal at least primarily, if not exclusively, with the Maryland Jockey Club. The Maryland Jockey Club not only held the license for racing at Pimlico, but had always held that license.



The Trustee had neither a dead track to sell to someone interested in going into the racetrack business, nor did it hold a going concern which it could offer to one who wanted to buy a racetrack business. It held a racetrack which was under lease to the Maryland Jockey Club, who had the (T.87—12) only available license to use that property for that purpose. Tangentially, there is no evidence in this case from which the Court could find or indeed indicating that the lease then extant was in any way an improvident lease.

The conduct of the Maryland Racing Commission and the Legislature, at least prior to the Miles amendment of Section 7 of Senate Bill 101, clearly indicated that the Maryland Jockey Club held one of the only four licenses and was, stating it another way, one of the only four licensees for the operation of one mile tracks in Maryland. It seems clear that if the Maryland Jockey Club and Pimlico had parted company, the license would have gone with the Maryland Jockey Club and not to the successor in possession of Pimlico. Before the Miles amendment, no sane person could consider paying a racetrack price for Pimlico without being certain that he could get a license to operate it as a racetrack. Under these circumstances, there would appear to have been nothing which could have been gained from advertising a racetrack for sale or placing it with a broker for sale. In any event, the evidence shows that advertising was unnecessary. Similarly, it is understandable why the inquiries received by the Trustee turned out, as the testimony tells us, in most instances to be just that—inquiries. The evidence shows no lack of diligence in pursuing these inquiries. The evidence is that they were followed up.

(T.87—13) So far as the Hanover Bank case, relied on so heavily by the Counter-Complainants, a reading of that opinion and understanding of the facts there, a reading of the record in this case and understanding of the facts here, demonstrate that they are entirely different cases. They are clearly distinguishable, and the circumstances in each case dictate what due diligence requires.

When the Miles amendment to Section 7 of Senate Bill 101 passed, it cannot be disputed that the Trustee had won a major battle. At the same time, it cannot be disputed that the war was far from over. The Trustee could not safely take respite until the adjournment of that session of the Legislature, and that victory did not mean that the subsequent truce was a bad bargain for the Trustee. Anyone who has a rudimentary knowledge of the legislative process knows that until the bill is finally passed and sent to the Governor you don't know what is going to be in it, and until the legislative session ends you have no way of knowing what action is going to be taken with respect to any pending bills. For the Trustee to have gone home from that session and rested on its laurels would have been to invite disaster. Even to have continued the battle vigorously with the hope of ultimate success does not seem to be a course of action that was prudent. Even under the Miles amendment, there are many questions as to what the value of the Pimlico Racetrack property, to the extent it (T.87—14) was held by the Trustee, would be.

The documents in the Trustee's files, so far as evidence of value is concerned, can be disposed of fairly quickly. The computations are merely that. They are efforts by various personnel to explore value and to arrive at what one could consider as a fair value for the property in question, using one method or another. While face amount of insurance and tax assessment may put one on inquiry as to the true fair market value of property, neither is a sound or safe measure of fair market value. Other objections aside, they are at best hearsay opinions, and in this case we are not even certain, to some extent, whose opinions they are.

It is apparent that the Trustee was fully aware of all of this evidence, and looking at all of the evidence as a whole it is obvious that neither the million eight hundred thousand dollar insurance figure nor the tax assessment figure indicates that the price received for the property was inadequate or that the fair market value of the property was any greater than that reveived for it.



The other principal item in this case, leaving value in itself, is the conflicts of interest. Virtually all of the evidence as to conflicts is the bare evidence of the relationships themselves, with the possible exception of the minutes of the Maryland Jockey Club referring to a conversation between Mr. Lanahan and Mr. Marburg. All of the other (T.87—15) evidence in this case and all of the evidence coming from live witnesses who are in a position to explain to us what occurred negates any actual conflict of interest. It is true, it is a fact, that Mr. Marburg and Mr. Lanahan were partners at Alexander Brown. It was, so far as partners go or number of partners go, a relatively small group of men. They were obviously in frequent contact during the period of these negotiations. However, there is, first of all—let me first dispose of another aspect of that, and that is the three hundred fifty shares of stock in the Maryland Jockey Club. Whether anyone seriously contends at this stage that Alexander Brown had any equitable interest in that stock is not clear. What is clear is that they did not. They were obviously holding those shares in street name for Mr. Vanderbilt. Mr. Marburg testified that he had no discussions with Mr. Lanahan concerning the sale, and I accept his testimony on that point. His testimony is consistent with the testimony of all of the other live witnesses from that era, and I have no reason to question or doubt it.

It is true, it is a fact, that Mr. Rieman was President of the Western National Bank. He was the chief executive officer of that bank, and that bank was the principal banker of the Maryland Jockey Club. There is no indication that Mr. Rieman in any way attempted to interced on behalf of the Maryland Jockey Club in connection with these (T.87—16) negotiations. Indeed the testimony is to the contrary.

There is no doubt, it is a fact, that Mr. Morgan and Mr. Perin were partners. Both shared in the fees received for the representation of the Maryland Jockey Club during this period, including those paid in connection with the sale. Mr. Perin testified that he had no conversations with Mr. Morgan concerning this sale, and I am as certain of this as I am of anything else in life that Mr. Perin in no way attempted to use

his relationship with his partner, Mr. Morgan, to better the position of the Jockey Club in this transaction or anything else. The suggestion that Mr. Morgan's connection with the Sunpapers, the suggestion of news management, does not warrant comment, but since it was pressed and was even mentioned in final argument I will state that there was no evidence of news management and no evidence that anybody used the Sunpapers to influence anyone in connection with this transaction.

It is clear, it is fact, that Mr. Johnston owned one hundred shares of the Maryland Jockey Club. There is no evidence that he interceded in any way on behalf of the Maryland Jockey Club, either for his own selfish interests or the interests of the Maryland Jockey Club generally. The testimony is to the contrary.

All that we have, and all that we apparently have ever had in this case, are these relationships and a (T.87—17) Directors' minute reference to a conversation between Mr. Lanahan and Mr. Marburg. The direct testimony, none of which I found suspect, is that none of these relationships in any way was a factor in the negotiations or in the ultimate sale. It is clear from the evidence that none of these Directors in any way participated in the negotiations or in the sale, or even in a formal approval of the transaction, at any stage. The most that could be inferred from the evidence is that somewhere along the line several of these Directors were present at a meeting and did not disqualify themselves when a report of the sale was made and formal approval, tacit or otherwise, was made by the Board, or by the Trust Investment and Executive Committee, of the transaction. The actual decision was obviously made by the executive officers of the corporation without consultation with the Board of Directors. The negotiations were handled exclusively by the executive officers of the corporation without assistance or consultation with the Board of Directors. All that occurred so far as the Directors were concerned was reports by the executive officers to the Board of what was being done or what had been done.



In any event, as I have already stated, the evidence is clear and convincing that the purchase price finally arrived at was an adequate one. Another case relied upon heavily by the Counter-Complainants was the Surrogate's opinion and decision in the Rothko case. Anyone reading that (T.87—18) opinion and taking the facts in that case and comparing them with the facts in this case must reach the conclusion that they are totally different and clearly distinguishable. The principles of law set forth in the Rothko case may be sound, but they have no application to the facts in this case as demonstrated by the evidence.

There are several subsidiary issues which were mentioned in closing arguments and pressed, at least to some degree, by the parties. I am not entirely certain how seriously the Counter-Complainants have pressed, at this stage, their claim with respect to depreciation reserve. However, I have reviewed that matter again, and my conclusion on that point is the same as it was when I made the decision at the conclusion of the Counter-Complainants' case in 1973. That is that the law of Maryland, at least in 1947, clearly did not require a depreciation reserve under the circumstances of this case and probably forbade such a depreciation reserve if we are talking about taking sums from the trust income—that is, from the rents received—and putting it aside and allocating it to the corpus or principal of the trust to offset the depreciation of the physical improvements to the real property. Even if we were to apply the law as set forth in the current Restatement and in the current Principal and Income Account, although I haven't really analyzed that carefully, I would seriously doubt that a depreciation reserve would be appropriate in the (T.87—19) circumstances of this case. None is mentioned in the trust instrument. The Trustee came into possession of this property encumbered by the lease to the Maryland Jockey Club. The principal beneficiary of the trust was the testator's eighteen or nineteen year old daughter, who was the life tenant. There was no other person alive at that time who was entitled—well, that is

not accurate. There were, I am sure, persons who would take in the event of intestacy. There was certainly no direct descendant of the testator alive or anyone that he would have the degree of concern for welfare of as he would for his only child and daughter. So, it seems to me too obvious to warrant discussion that it was the testator's intention that the full income from this trust was to go to his daughter in preference to taking and reducing that income to preserve the integrity of the corpus for some long distant distribution to then unknown persons or to those persons who would be appointed by the daughter under the power of appointment.

The remaining issue is that raised by the Counter-Defendant of laches. Lest I be misunderstood, it is clear to me that the Trustee, the Counter-Defendant, very seriously and very vigorously presses the defense of laches. I had at the outset of this case more or less rejected laches as being a serious factor because it was then my understanding of the law of Maryland that limitations and, by analogy, laches does not begin to run against a remainder beneficiary (T.87—20) until the remainder falls in. My interest in this apsect of the case was reawakened by the very persuasive argument of Mr. Eney. I have reconsidered it, and I have arrived at essentially the same conclusion. That is, the general rule is as I have stated. There may be exceptions to the rule or there may be cases which appear to be inconsistent with this general rule, but as I understand the law there is a difference between a case in which the life tenant or the trustee takes a position inconsistent with the trust during the term of the life estate and other instances or conduct giving rise to a cause of action. I think what brings me most forcefully to my final conclusion on this issue is that had this been a truly meritorious case of self-dealing or true conflicts of interest by the Trustee, I don't feel that one would seriously consider barring the claim on the ground of laches.

It is true, and I find as fact, that Mrs. Cosden and James Madden were aware of the sale of Pimlico at the time the sale occurred, either shortly before, at the time, or shortly after. The evidence is not specific as to whether Mr. James Madden had



actual knowledge of the price, but I would find it hard to believe that his sister did and he didn't, and therefore I infer James Madden had knowledge around the time of the sale that the racetrack had been sold from the trust for a sum approximating one million dollars. I accept Mr. Madden's testimony as to the times when he (T.87—21) acquired knowledge of the various facts which would bear on this issue. Although there was a substantial—well, let me go back a moment to the facts. The record is barren as to when Michael and Christina gained knowledge, and I would infer from the evidence available that they gained knowledge of the facts known by Peter Madden no earlier than the times when Peter Madden gained that information. Applying the general rule that limitations do not run, by analogy we do not have laches until the remainder falls in. I do not feel that there was inordinate delay in the action taken by any of the Counter-Complainants in making their claim against the Trustee and pursuing it through this litigation. Therefore, I find that the Counter-Complainants are not barred in this case by laches.

I cannot leave this point without observing the obvious. That is, it is unfortunate that a trustee can be put to this type of defense more than a quarter of a century after the event, but that is part of the business of being a trustee, and if, as I alluded to a moment ago, the claim is meritorious, I think no one can complain that the discovery and the pursuit of the remedy, discovery of the default or defalcation and the pursuit of the remedy, occurs substantially after the event. The protection of the Trustee against the nonmeritorious claim in cases such as these is the right to claim and to be awarded the costs of the litigation, as is the custom in the successful defense of a surcharge action.

(T.87—22) Gentlemen, that is the decision and those are the principal reasons for it. We are at the point where we need a decree. My recollection is that the last time I requested a decree there was a substantial lapse of time before one was signed. I certainly would hope, and I am not suggesting that anyone present was the cause of that; I am just stating my earnest hope

that such does not occur this time. I would like to sign a decree as promptly as possible, and I would request counsel for the Counter-Defendant to prepare such a decree, and after submitting it to counsel for the Counter-Complainants and the Counter-Complainant pro se, present it to me. I would make this additional suggestion and request. The last time we had what I thought was a final decree, we concluded everything with respect to costs of litigation except the amount. It would seem to me that, in view of the obviously substantial amounts that will be involved because of the length of this trial, that the amounts to date should be included in the decree. Unless there is a very persuasive argument made to the contrary, I would certainly prefer to do it that way. If there is an appeal, there will obviously be additional expenses, but a further determination can be made in the future with respect to that. I would think that everything which has been done to date should be attended to in this decree so that we string as little of this case out for the future as possible, and also minimize the risk of more (T.87—23) than one appeal.

(Mr. Eney) Your Honor, we will prepare a draft of the decree immediately and circulate it to other counsel. With respect to your Honor's last suggestion, I am quite certain, in view of the statements that have been made by Mr. Peter Madden and Mr. Parker from time to time, that the determination of the amount of costs and expenses to be allowed to the Trustee will involve another hearing and, indeed, perhaps a hearing of more than a few hours at least. I mention that to your Honor now to raise the question when on the hearing. I for one would very much like to dispose of the whole matter, and I don'tknow what your Honor's schedule is going to be as to availability for such a hearing later on this month. We would like to have the decree signed as quickly as possible, of course. Your Honor may recall the period of nearly a year that elapsed last time was due almost entirely to the hearings on the decision of the question of principle as to whether costs should be allowed.

(The Court) I understand that.



(Mr. Eney) That doesn't have to be decided this morning.

(The Court) I understand. I guess I really wasn't thinking. I was just going through the mental exercise. If I had been thinking, I would have anticipated that. What I was thinking of was a brief hearing some morning, but I (T.87—24) suppose, now that you confront me with the problem, based on long experience in this case, it would be doubtful that we could dispose of it in an hour or two, in a morning or an afternoon.

(Mr. Eney) I think it would be a matter that ought to be set for hearing at 10:00 o'clock in the morning, with the uncertainty as to how long it would go. Let me make this suggestion. Is your Honor going to be in Criminal Court next week or in the Courthouse?

(The Court) Yes. I am, with the exception of—what I started to say and the light went on in the back chamber of my mind, with the exception of the week of August 23rd I will be in the Courthouse the balance of the summer. Again I am scheduled for leave the week of August 23rd, but it is possible that I could take one of the days in the early part of that week and not take leave.

(Mr. Eney) Your Honor, I must confess I think that is an imposition in view of the fact your Honor already interrupted his vacation schedule for this case.

(The Court) I would prefer to do that to delaying this matter. As I have indicated before, starting Monday I go into Criminal Court and I am there until the end of June, subject only to special assignment, and under our policy the Criminal Court never closes, so that when I don't sit someone else has to close a civil court and sit for me. (T.87—25) I wouldn't even want to consider that until after Labor Day when all the Judges are back and we are in full force. Then we are approaching mid-September when I could arrange to have someone sit for me. It seems to me those would be the alternatives. I don't like the idea of delaying this into September.

(Mr. Eney) I don't either. Your Honor, Monday is the 9th. Might I suggest we will confer with Mr. Parker and endeavor to

confer with Mr. Madden and try to arrive at some general understanding, and then communicate with your Honor next week, meet you in chambers some afternoon.

(The Court) Well, let's proceed that way. We will deal with the problems as they come.

(Mr. Eney) We will get a form of decree that, hopefully, can be agreed upon very promptly. Let me mention one other matter. Your Honor gave a very extended and thorough opinion orally this morning, and all of us were listening very intently and trying to write at the same time. There is always a possibility that we misunderstand or that the Court inadvertently uses the wrong word. I would like to have the Reporter prepare for us immediately a transcript of your Honor's opinion, and I wanted to ask your Honor whether you want her to give that to your Honor for review and editing before she gives it to us.

(The Court) She always gives it to me for review. I don't really edit. I may suggest a correction, (T.87—26) but it goes as I say it, as best I remember I said it. If I have, as you suggest, used a wrong word, that would be a matter for correction. It is just a matter of form. The reporters always let me look at my opinions before they are put in final form. I have a great habit of swallowing articles and dropping my voice. That sometimes presents a problem for the reporter.

(Mr. Eney) Then we would ask the Reporter to prepare the transcript for us as quickly as possible. Thank you, your Honor.

(The Court) I am not accusing; I am asking. Are you suggesting I missated something?

(Mr. Eney) No, I am not suggesting that. I recall one place that is going to hit your Honor, obviously, where at the beginning part of a sentence you said Pimlico. I am sure you meant Maryland Jockey Club. That is not my particular concern. That is a mere typographical thing, but as both Mr. Civiletti and I were writing we caught things slightly differently and I am not sure either one of us has it correctly. There may



have been statements made by your Honor that were not exactly as you intended or they may have been and we didn't get them. There certainly isn't anything we could specifically suggest to you now without seeing the transcript.

(Mr. Civiletti) Your Honor, two minor things. (T.87—27) I think your intention is perfectly clear from your language and the meaning within that language, but, as you know, lawyers and parties that are lawyers particularly analyze language under a microscope, and oral language sometimes comes out substantially different than if you were writing or drafting. There are two minor points I think are perfectly clear, but I would make inquiry to your Honor about. One concerns the value part of the opinion, when your Honor turned from carefully reviewing Mr. Walker and Mr. Kovach and stated your position there and then expressed, I think correctly and soundly, that it was highly doubtful that capitalization of earnings was an acceptable method of appraisal or an indication of value. In any event, after having thoroughly considered it and all the things you said about it, my question was simply what you mean—do I understand correctly that it was highly doubtful that the capitalization of corporate earnings was an acceptable method of appraisal value here in this case?

(The Court) What I intended to say, whether I said it or not, is, first of all, it is highly doubtful, in my opinion, that capitalization of earnings of a business entity which is occupying the real property is an acceptable method of valuation of the real property. Numer one, just as a general principal of law, and as I understand some of the expert, appraisal practice and theory. Then I say that even if it is an acceptable method of appraising real estate, (T.87—28) its use in this case in subject to very serious question because of the fact that there isn't a true entity to be used. We use the hypothetical entity, and as I understand and at least I am persuaded by Mr. Kovach, when you start getting into hypotheticals you are getting away from reality and away from sound opinion. I think it makes common sense and he persuaded me on that point, and then my third statement in that part of my analysis was that in

any event in this case, since I accept Mr. Kovach's opinion as the sounder of the two expressed on that point, even utilizing that approach there is no evidence of inadequacy of price for the sale.

(Mr. Civiletti) That is exactly as I understood your reasons and findings. The second point is even more minor, or it is a matter of, I think, simply nitpicking with language. That is in the area where your Honor was speaking about conflicts of interest, and clearly stated several times that there was no more present in this case then bare evidence of relationships themselves without more, with that one exception which your Honor dealt with. Under that principal finding, your Honor said that it was true in fact that Mr. Lanahan was a partner in Alex. Brown, which was a small firm, and then—and this is the only point I make in that regard—that there were naturally or naturally the inference would arise that there were frequent either communications or contacts, I am not sure which you mentioned, between the (T.87—29) members of that firm during these negotiations or the period of these negotiations. From what followed, it seemed to me perfectly clear that your Honor was referring to ordinary business communications between those partners, relating to Alex. Brown's business, and had no relationship to the negotiations.

(The Court) If I said communications, I meant contact.

(Mr. Civiletti) Some incidental contact unrelated to—

(The Court) That is the type of contact to which I made reference; not contact relating to or discussing these negotiations. I think we have to accept the fact that Mr. Lanahan and Mr. Marburg saw each other during these periods and that was business and perhaps social contacts, not contacts having any bearing on these negotiations or this transaction. I am glad you asked this latter question because you remind me of one omission that I made in that analysis. I had skipped over my notes on this point to another point and had intended to come back and I didn't. That was in the area of conflicts with respect to the stock held by Safe Deposit and Trust Company as



trustee and agent for others, which did amount to a substantial minority holding. My understanding of the law generally with respect to trustees is that there is no prohibition against a trustee being (T.87—30) involved in a transaction with a corporation in which it holds a minority interest. I explored it somewhat more fully in the discussion following the decision in 1973. Again this is a point that has not been, as I understand it, pressed vigorously at this stage of the trial, but I have reconsidered that aspect and I arrived, both in law and fact, at the same conclusion. There is no indication that those minority holdings had any bearing or any effect on this transaction, beyond the fact that it gave the Trustee a source of knowledge concerning the financial operations of the Maryland Jockey Club which might not have been available to all other persons, but certainly there was no indication of disloyalty or anything of a conflict nature that would reflect adversely on the conduct of the Trustee or the transaction itself.

Mr. Clerk, we shall adjourn for the day.

## FINAL ORDER AND DECREE OF BALTIMORE CITY CIRCUIT COURT DATED SEPTEMBER 14, 1976

In The Circuit Court of Baltimore City
112A/382/52662

**(Filed September 14, 1976)**

*Mercantile-Safe Deposit and Trust Company, Trustee u/w of William R. Hammond, Plaintiff*

*v.*

*Audrey Cosden, et al., Defendants*

*Peter H. Madden, Audrey Cosden, Michael Madden, and Christina Madden, Counter-Complainants,*

*v.*

*Mercantile-Safe Deposit and Trust Company, Trustee u/w of William R. Hammond, and in its individual capacity, Counter-Defendant.*

### FINAL ORDER AND DECREE

Further proceedings on the third amended counterclaim filed by Peter H. Madden, Audrey Cosden, Michael Madden and Christina Madden against Mercantile-Safe Deposit and Trust Company, Trustee under the will of William R. Hammond and in its individual capacity, coming on to be heard pursuant to the mandate of the Court of Special Appeals filed in these proceedings on July 14, 1975, evidence was adduced by the counter-complainants and by the counter-defendant; Peter H. Madden in proper person and counsel for all other parties were heard in argument; and the Court having delivered its oral opinion in open court on August 6, 1976, it is thereupon this 14 day of September, 1976, by the Circuit Court of Baltimore City, for the reasons set forth in the said oral opinion of the Court,



ADJUDGED, ORDERED AND DECREED:

1. The thrid amended counterclaim be and the same is hereby dismissed with costs to the counter-defendant.

2. The trustee is hereby allowed the sum of $877.78 for expenses incurred by it pursuant to the order entered herein on February 13, 1973, such amount to be paid to the trustee by the counter-complainants as follows:

Audrey Cosden — $438.88
Peter H. Madden — $146.30
Michael Madden — $146.30
Christina Madden — $146.30

3. Paragraph 8 of the decree entered herein on May 23, 1974 is reaffirmed and the reasonable expenses, including counsel fees, incurred by the trustee in opposing and defending against the original and the first, second and third amended counterclaims in such amount as shall be hereafter determined and allowed by the Court, and so much of the court costs as relate to the counterclaims filed herein (as determined by the Clerk), shall be paid out of and charged against the respective distributive shares of Audrey Cosden, Peter H. Madden, Michael Madden and Christina Madden in the trust estate herein in such proportions as shall hereafter by determined by the Court, and no part thereof shall be paid out of or charged against the respective shares of Anne Hallenbeck and Jayne Humphreys in the trust estate herein.

4. Neither the Maryland Rules nor the applicable statutes or common law of Maryland authorize the allowance to the trustee of compensation for the additional work or services required of it in opposing and defending against the original or the first, second or third amended counterclaims.

5. There is no just reason for delay with respect to any of the matters covered by this order and this order shall therefore operate as a final order within the meaning of Maryland Rule 605a with respect to all the matters covered hereby.

DAVID ROSS,
Judge.

## ORDER OF BALTIMORE CITY CIRCUIT COURT DATED OCTOBER 4, 1976 DENYING MOTION FOR RECONSIDERATION

**(Filed October 4, 1976)**

In The Circuit Court of Baltimore City

Docket 112A
Folio 382 No. 52662

MERCANTILE-SAFE DEPOSIT & TRUST COMPANY, Trustee, etc., *Plaintiff*

v.

AUDREY COSDEN, et al., *Defendants*

PETER H. MADDEN, et al
*Counter-Complainants*

v.

MERCANTILE-SAFE DEPOSIT & TRUST COMPANY, Trustee, etc., *Counter-Defendant*

O R D E R

For the reasons stated orally at the hearing in open court September 14, 1976, the "Petition And/Or Motion Of Counter-Complainant Peter H. Madden Brought Under General Law And Under Maryland Rules 625 And 690 Inclusive For The Court To Reconsider Its Opinion Of August 6, 1976 And To Vacate Any 'Judgement(s)' Or Final Order(s) And/Or Final Decree(s) Made Pursuant Thereto" is hereby denied this 4th day of October, 1976.

/s/ David Ross

Judge



## OPINION OF MARYLAND COURT OF SPECIAL APPEALS DATED JUNE 12, 1975

**(Filed July 16, 1975)**

*(Reported)*

*In the Court of Special Appeals of Maryland*

*September Term, 1974*

*No. 803*
*[Two Appeals in One Record]*

*Peter H. Madden, et al.,*

*v.*

*Mercantile-Safe Deposit and Trust Company, Trustee, et al.*

*Morton, Powers, Gilbert, Judges*

Opinion by Powers, Judge, Filed: June 12, 1975:

This case involves the Pimlico Race Track and the law of trusts. A prologue to the litigation now before us could, in the right hands, make a thoroughly enchanting historical novel. The present case, and other litigation which arose as the Hammond Trust approached or arrived at its termination, could furnish the material for a fascinating documentary.

Because it is beyond our competence to achieve either of those results, as well as inappropriate that we attempt to do so, we shall relate, in unembellished form, only so much of the

history and of the facts involved as are material and necessary to an understanding of the legal questions we must decide.

**Background for the Present Case**

William R. Hammond became the owner, in 1905, of some 78 acres of land, with improvements, known as Pimlico Race Track, then located in Baltimore County but which, by later annexation, became a part of the City of Baltimore. The entire property was leased to The Maryland Jockey Club of Baltimore City, which conducted horse racing there. Mr. Hammond, then a widower, died in 1909. His will left the Pimlico property and other assets to Safe Deposit and Trust Company of Baltimore, now Mercantile-Safe Deposit and Trust Company,[1] in trust, and provided, with minor exceptions not now material, that the income be paid to his only child, a daughter, Audrey F. Hammond, for her life. The daughter later became Mrs. Audrey Hammond Madden. In his will the testator gave his daughter a power of appointment, and provided that if she did not exercise the power, the principal of the trust would, at her death, go to the persons who would be entitled to it as if he had died intestate.

Through successive leases negotiated between them from time to time, the Pimlico property held by Mercantile, enlarged by the later acquisition of certain contiguous parcels, was continuously leased to the Jockey Club, until August 1947. Under an agreement of sale dated 30 April 1947, the Trustee sold the Pimlico property which it held to the Jockey Club for $1,115,000. Settlement of that sale in August 1947 terminated the lease which, by its terms, would have ended in 1949.

Mrs. Madden, in 1943, irrevocably released the power of appointment she had under her father's will. The legal effect of that release was determined by the Court of Appeals in *Madden v. Mercantile-Safe Deposit and Trust Co.*, 262 Md. 406, 278

[1]We shall refer to the trustee throughout as "Mercantile", although that part of the name was acquired by merger in 1953.



A.2d 55 (1971). Her release of the power of appointment, thus rendering impossible a divestiture of the remainder, which she could have accomplished by an exercise of the power, did not, as she contended, merge the remainder with her life estate, on the ground that she was the sole person who would have been entitled to take if Mr. Hammond had died intestate. On the contrary, said the Court of Appeals, the class of persons entitled to the remainder was to be determined at the time of Mrs. Madden's death, and would be those persons who then would have been entitled, according to the law in effect in 1909, to take Mr. Hammond's estate had be died intestate.

To continue this narrative, we quote from the opinion in *Madden v. Cosden*, 271 Md. 118, 314 A.2d 128 (1974), an earlier appeal from an order entered in the present case, where the Court of Appeals said, at 119-20:

> "Mrs. Madden died on 4 January 1972, survived by three daughters, Audrey Cosden, Anne M. Hallenbeck, and Jane M. Humphreys, each of whom have descendents, and by three grandchildren, Peter H. Madden, Michael J. Madden and Christina Little Madden, the children of Mrs. Madden's only son, James H. Madden, who had died in 1953.
>
> "Immediately following Mrs. Madden's death, Mercantile-Safe Deposit and Trust Company (the Mercantile), trustee of the trust estate created by Mr. Hammond's will, caused to be prepared a schedule of the assets then comprising the trust, which had a value of some $3,000,000.00, and of a proposed distribution, under which Mrs. Cosden, Mrs. Hallenbeck and Mrs. Humphreys, daughters of Mrs. Madden and granddaughters of Mr. Hammond, would each receive one-fourth of the trust assets, and Peter H. Madden, Michael J. Madden and Christina Little Madden, grandchildren of Mrs. Madden and great-grandchildren of Mr. Hammond, would each receive one-twelfth of the trust assets, since they

shared equally the one-fourth share which would have passed to their father, if living.

"When it became apparent that all of the children of James H. Madden were not willing to acquiesce in the proposed distribution, the Mercantile in June, 1972, filed in the Circuit Court of Baltimore City a bill of complaint which recited the circumstances; asked that the court assume jurisdiction of the trust, and determine the proper distribution of the trust estate.

"All of the parties defendant answered. Mrs. Cosden, Mrs. Hallenbeck and Mrs. Humphreys accepted the proposed distribution. Michael J. Madden and Christina Madden submitted to the jurisdiction of the court. Peter H. Madden later filed an amended answer and cross-claim in which he assserted, *inter alia*, that he was entitled to one-sixth of the trust assets, on the theory that the trust estate was equally distributable between Mrs. Cosden, on the one hand, and the three children of James H. Madden, on the other.

"The filing of the answer and cross-claim spawned a flurry of pleading, pre-trial discovery and depositions, little of which is pertinent here. Ultimately, the issue raised by Peter H. Madden's cross-claim as regards the distribution of the corpus of the trust came on for separate trial. From a decree ordering distribution in the manner proposed by the Mercantile, Madden appealed."

The issue presented and decided in *Madden v. Cosden, supra*, was the validity of Mrs. Madden's second marriage, following a Nevada divorce, and whether Mrs. Hallenbeck and Mrs. Humphreys, children of that second marriage, were entitled, as lawful heirs and next of kin of Mr. Hammond, to share in the distribution. The Court of Appeals held that they were.



## THE PRESENT CASE IN THE CIRCUIT COURT

Mercantile's bill of complaint to determine the proper distribution of the trust was filed in the Circuit Court of Baltimore City on 23 June 1972. Combined answers, cross-claims, and counterclaims filed by Peter H. Madden on 21 August and 23 August were later stricken, apparently for reasons of form, and on 26 December 1972, with leave of court, he filed an amended counterclaim, naming as counter-defendants Mercantile, in its trust capacity and in its individual capacity, and, as an added party, the Jockey Club. Leave to bring in the Jockey Club as a counter-defendant was later granted. At the same time he filed his answer to Mercantile's complaint Peter H. Madden filed the cross-claim against his codefendants which raised the issue decided in *Madden v. Cosden, supra.*

On 10 April 1973, with leave of court, Peter H. Madden filed a second amended courterclaim, in which Audrey Cosden joined. On 17 May 1973, with leave of court, a third amended counterclaim, in which Michael Madden and Christina Madden also joined as counter-complainants, was filed.

The counterclaim alleged that in selling the Pimlico Race Track to the Jockey Club in 1947, Mercantile had breached its fiduciary duty in numerous ways, resulting in the disposition of a trust asset for an inadequate price. It sought to surcharge Mercantile for the difference between the sale price and the actual value, or, in the alternative, to rescind the sale.

Trial on the merits of the issues raised by the third amended counterclaim and the pleadings responsive to it was held before Judge David Ross beginning 4 June 1973. Evidence on behalf of the counter-complainants was concluded on 21 June 1973. Several motions then made or pending were argued. On 27 June 1973 Judge Ross rendered an oral opinion ruling on several motions, and reserving his ruling on one of the motions until after receipt of requested memoranda from counsel. The all-important ruling made at that time was the granting of motions

of the counter-defendants to dismiss the third amended counterclaim on the ground that the evidence was not legally sufficient to entitle the counter-complainants to recover.

Other rulings had been made from time to time on interlocutory matters before the trial on the merits. Other questions arose and were ruled upon during the post trial period. A final decree was signed by Judge Ross and filed on 23 May 1974. An order for appeal filed timely thereafter by Peter H. Madden, separately, noted his appeal from an order entered on 13 February 1973, from an order of satisfaction between the four counter-complainants and the Jockey Club, approved by the court and filed on 29 October 1973, and from the final decree of 23 May 1974. An order for appeal on behalf of Audrey Cosden, Michael Madden, and Christina Madden noted their appeal from the order entered on 13 February 1973[2] and from the final decree of 23 May 1974.

## THE ISSUES IN THIS APPEAL

In this Court the appeals were separately briefed and argued by appellant Peter H. Madden on the one hand, and on behalf of appellants Audrey Cosden, Michael Madden, and Christina Madden, on the other hand. Questions presented by Peter H. Madden in his brief are these:

I. The Sale of Pimlico

"Whether it was improper for the Trustee to have sold Pimlico Race Track for substantially less than the value of the fiduciary asset and whether the Trustee should have its commissions disallowed and should be surcharged for the inadequacy in price, consequential damages and interest."

II. Special Fee To See The Trust Records

"Whether the Trustee has a right to charge the beneficiaries

[2]The order of 13 February 1973 authorized inspection of Mercantile's trust records, and directed that the cost of monitoring the inspection be prorated among the parties participating.



a special fee in excess of statutory commissions for the salary of its employee whom it assigned to oversee the inspection of the trust records."

III. Mercantile-Safe's Claim for Double Attorneys' Fees

"Whether the Trustee has any right to reimbursement for its attorneys' fees and disbursements."

"If reimbursement is awarded, whether the Trustee may properly have reimbursement for the attorneys' fees and disbursements of two law firms, in one case, employed by it as Trustee, and in the other case, employed by it in its individual corporate capacity."

Another contention of Peter H. Madden involves the effect of the mutual post-trial order of satisfaction of all claims between the four counter-complainants and the Jockey Club. Before the final decree he moved to amend or correct that order, fearing that it may be subject to a construction which would be contrary to the intent of the parties. His motion was heard and denied after the final decree. He noted an appeal from the order denying that motion.

In their brief and in their argument here, the other appellants present in three different aspects the contention that Mercantile, in the sale of the Pimlico Race Track, breached its duty as a fiduciary, and should be surcharged for the difference between the sale price and the actual value of the trust asset. They raise the additional question of whether Mercantile had the right to pay itself a percentage of the sale price as a commission, without an appropriate order of court.

Appellant Peter H. Madden, tangentially if not directly, and the other appellants directly, argue that the chancellor erred in granting a motion to strike the evidence of two witnesses who testified for the counter-complainants on the question of value.

Somewhat related to two of the subsidiary questions in this appeal, yet standing on its own, is the position of Jane M. Humphreys and Anne M. Hallenbeck, the two younger daughters of Audrey H. Madden. They appear here as

appellees. They were named as defendants in the original bill of complaint. They consented to the distribution proposed by Mercantile. They filed in the case on 1 June 1973 a statement of position, saying that they did not wish to become parties to the counterclaim, nor enter that portion of the case in any manner, and disclaiming, renouncing, and releasing Mercantile and the Jockey Club from any claims made by the counter-complainants. Their only concern here is that there be no change in the chancellor's order that the reasonable expenses of Mercantile, including counsel fees, be charged, not against the entire trust estate, but only against the distributive shares of the counter-complainants.

## THE MOTION TO DISMISS

We shall proceed directly to a consideration of the major question in the case—the correctness of the chancellor's order granting the motion of Mercantile to dismiss the counter-complaint.

Maryland Rule 535 says:

> "In any action tried by the court without a jury at law or in equity, any party, without waiving his right to offer evidence in the event the motion is not granted, may move at the close of the evidence offered by an opponent for a dismissal on the ground that upon the facts and the law he has shown no right to relief. Unless the court otherwise specifies, such a dismissal operates as an adjudication upon the merits."

It was this Rule which Mercantile invoked when, at the close of the evidence offered by the counter-complainants, it moved for a dismissal. The motion tested the legal sufficiency of the evidence.

In *Allen v. Steinberg,* 244 Md. 119, 223 A.2d 240 (1966), Chief Judge Hammond said for the Court of Appeals, at 123:



> "We think that in deciding whether to dismiss an equity action at the close of the complainant's case, the chancellor under Rule 535 must view the evidence, that is, draw the legitimate inferences most favorably to the complainant* * *."

In that case the Court reviewed the evidence and concluded that it made out a prima facie case. It remanded "for the taking of the testimony of the appellees to rebut if they can the prima facie case made out by appellant."

In *Price v. Levin,* 248 Md. 158, 235 A.2d 547 (1967), Price had sought to enjoin, as in violation of zoning regulations, a use by Levin of his property. The chancellor had granted Levin's motion to dismiss. Saying that Price was entitled to have the chancellor consider the evidence and all logical and reasonable inferences deducible therefrom in a light most favorable to him, the Court recited some of the facts which emerged from the evidence. It said; at 162:

> "Price's case has other facets which, in the final analysis, may or may not advance his cause but, at this stage of the proceedings, it is not necessary for us to dwell upon them since we think the evidence above set forth makes out a prima facie case that Levin was in violation of the regulations. The chancellor should have denied his motion to dismiss."

The Court reversed the order and remanded the case for further proceedings.

After a lengthy review of the evidence before the chancellor in *Shoreham v. Randolph Hills,* 248 Md. 267, 235 A.2d 735 (1967), the Court of Appeals said, at 278:

> "It must be borne in mind that the Chancellor dismissed the bill of complaint at the close of the appellants' case pursuant to Maryland Rule 535, and under such circumstances the testimony and evidence adduced by the appellants stand undisputed and they

> are entitled to every favorable inference which may reasonably be drawn from their testimony and exhibits. We think the Chancellor was in error in dismissing the case, and accordingly we reverse the order granting the motion to dismiss and remand the matter for further proceedings."

To the same effect in their application of Rule 535 are *Isen v. Phoenix Assurance Co.*, 259 Md. 564, 270 A.2d 476 (1970); *Styers v. Dickey*, 261 Md. 225, 274 A.2d 374 (1971); *Davis Advisory Services v. Executive Staffing*, 264 Md. 644, 288 A.2d 148 (1972); *Presutti v. Presutti*, 270 Md. 193, 310 A.2d 791 (1973); and *Snider Bros., Inc. v. Heft*, 271 Md. 409, 317 A.2d 848 (1974). In *Davis Advisory Services v. Executive Staffing, supra*, the Court of Appeals said, at 645:

> "In order for the trial judge to have correctly granted this motion it would have been necessary for him to consider appellant's evidence, including all logical and reasonable inferences which can be drawn therefrom, in a light most favorable to Davis and then properly determine that a prima facie case had not been established."

We have reviewed the evidence which was before the chancellor in the present case. Before we could reach a conclusion it was necessary that we establish precisely what was the ultimate issue upon which the ruling must turn, what subordinate issues there were to be determined as requisites to the determination of the ultimate issue, what the applicable law required as a showing sufficient to establish each issue, or to raise, as to each issue, a conflict which called for the use of the judicial fact finding process.

Adequacy of the selling price of the trust asset is the single contention of the appellants around which everything else revolves. It is the ultimate issue in this case. Inadequacy may in some cases be established by direct evidence, and generally must be accompanied by a showing of lack of diligence, failure to



exercise judgment, lack of good faith, or the existence of such conflicting interests, real or potential, as to raise doubts of the ability of the trustee to live up to the duty of loyalty he owes to the beneficiaries.

In II Scott, *Law of Trusts*, §170 (3d ed. 1967) the author says:

> "The most fundamental duty owed by the trustee to the beneficiaries of the trust is the duty of loyalty. This duty is imposed upon the trustee not because of any provision in the terms of the trust but because of the relationship which arises from the creation of the trust. A trustee is in a fiduciary relation to the beneficiaries of the trust. There are other fiduciaries such as guardians, executors or administrators, receivers, agents, attorneys, corporate directors or officers, partners, and joint adventurers. In some relations the fiduciary element is more intense than in others; it is peculiarly intense in the case of a trust. It is the duty of a trustee to administer the trust solely in the interest of the beneficiaries. He is not permitted to place himself in a position where it would be for his own benefit to violate his duty to the beneficiaries."

The responsibilities of a trustee in selling a trust asset were discussed by the Court of Appeals in *Kramme v. Mewshaw*, 147 Md. 535, 128 A. 468 (1925). Suit was brought by a beneficiary in the remainder asking the court to assume jurisdiction over a testamentary trust, and to set aside a sale of a farm made by the trustee. The Court of Appeals reversed the lower court's action, after a full trial on the merits, in setting aside the sale. The Court noted, at 541:

> "There is no question that the trustees had the power, and that it was sound judgment, to sell the farm. Whether jurisdiction should be assumed and the sale upset turns on (1) the method of making the sale and (2) the inadequacy of the purchase price."

After reviewing pertinent facts the Court said, at 545:

"During these unhurried negotiations between the purchaser and the trustees, the court has not found anything but the usual matching of wit against wit in the effort of the vendors to sell as high, and the vendee to buy as cheap, as possible. Nothing occurred in the course of the transaction on which to base a charge that the sale was induced by fraud, deceit, misrepresentation, or other wrongdoing by the buyer, or was the result of any material dereliction of duty on the part of the trustees, who acted throughout honestly and in good faith."

Here we think it is helpful to quote somewhat extensively from the opinion written by Chief Judge Brune for the Court of Appeals in *Webb & Knapp v. Hanover Bank*, 214 Md. 230, 133 A.2d 450 (1957), in which the Court affirmed the action of the chancellor below in refusing, after a full trial on the merits, to ratify a sale of a trust asset made by a conventional trustee, and ordering that the property be resold. The court said, at 243-44:

"In speaking of the duties of a conventional trustee, as distinguished from a judicial trustee, this Court said in *Kramme v. Mewshaw, supra*, (at 147 Md. at 548) 128 A. at 473: 'A conventional trustee, * * * who is proceeding without the assumption of jurisdiction by the court, is not affected by the regulations of the mode of sale in chancery, but he is bound, in the effort to secure the fair market value of the property, to employ that degree of care which a reasonably prudent man would exhibit in the conduct of a similar sale. *Miller's Equity*, secs. 493, 495, 488. If a sale should be made by a conventional trustee in good faith and according to his best judgment, the sale will not be set aside unless there exists an inadequacy of price that, under the circumstances, is directly attributable to some failure of reasonable diligence or effort in the making of the sale.'



"Later in the same case the Court said (147 Md. at 550-551): 'While a private sale, without public advertisement, does not require the same degree of inadequacy of price and of a reasonable expectation that a re-sale will produce a better result as are necessary to defeat a sale by public auction, yet both an inadequacy of price and a justifiable expectation of securing a higher price must co-exist before a court will set aside a contract of private sale made in good faith by a conventional trustee in the exercise of a discretion which was incident to an express power of sale. *Weinstein v. Boyd*, 136 Md. 227, 234; *Baer v. Kahn*, 131 Md. 17, 26, 27 * * *.'

"*Kramme v. Mewshaw* is cited with approval in *Knight v. Nottingham Farms, Inc.*, [207 Md. 65, 113, A.2d 382 (1955)].

"Fiduciaries undertaking to exercise powers of sale must, of course, make proper efforts to learn the value of what they propose to offer for sale. *Park & Tilford Import Corp. v. Nash*, 166 Md. 373, 171 A. 339.

"Mere inadequacy of price alone will ordinarily not warrant setting aside a sale. *Boyd v. Smith*, 127 Md. 359, 96 A.526, and cases therein cited. See also *Shirk v. Soper*, 144 Md. 269, 124 A. 911.

"Nor will the mere fact that someone else is later willing to pay more for the property by itself cause a sale to be set aside. *Blank v. Frey*, 165 Md. 647, 170 A.156; *Cook v. Safe Deposit & Trust Co.*, 172 Md. 398, 191 A. 713; *Gilden v. Harris*, 197 Md. 32, at 42, 78 A.2d 167."

In the case before us the contentions of the appellants cover the full range of breach of fiduciary duty, from bad faith and self dealing, to precipitous action, lacking the required diligence, and taken by the exercise of poor and uniformed judgment and without exploiting potential offers to buy at a higher price.

In a case attacking the sale of real estate by a testamentary trustee, *Lopez v. Lopez*, 250 Md. 491, 243 A.2d 588 (1968), Judge Singley for the Court of Appeals discussed the contention of the appellants-beneficiaries regarding the burden on Helen Lopez, the trustee, and said, at 501-02:

> "Helen's position, as stated in her brief, is that the beneficiaries, who were the plaintiffs below in the case attacking Helen's administration of the trust, have the burden of proving that they are entitled to relief; that if 'doubts and obscurities' were raised by the beneficiaries, they were resolved by testimony offered by or in behalf of Helen; and that a consideration of each of the challenged transactions will bear this out. Helen's position is well taken.
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> > 'A beneficiary seeking to obtain relief for a breach of trust must plead and prove facts which show the existence of a trust duty, the failure of the trustee to perform it and that consequently the court should grant the requested remedy. * * * If the cestui shows a prima facie case, the burden of contradicting it or showing a defense will shift to the trustee.' Bogert, *Trusts and Trustees* (2d Ed. 1962) § 871 at 89-90.
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> Putting this another way, the person who challenges the conduct of a trustee, must first allege that the trustee has a duty and has been derelict in the performance of this duty, and offer evidence in support of this allegation. Then, and not until then, does the trustee have the burden of rebutting the allegation. In the absence of such proof, there is no duty on the trustee to prove a negative: *i.e.*, that he has not been derelict in the performance of his duties.
>
> "We think that the beneficiaries' reliance on 'doubts and obscurities' as a reason for shifting the burden of proof is misplaced. This is a concept peculiarly applicable to trust accounting. *Berlage v. Boyd*, 206 Md. 521, 532, 112 A.2d 461 (1955); *Hatton v. Weems*, 12 G. & J. 83, 109 (1841); *Bogert, supra*, § 962 at 11, and there is no doubt that a trustee who fails to keep proper accounts has the burden of proving entitlement to the credits he claims. *Restatement (Second), Trusts* (1959) § 172, comment b at 377; *Berlage v. Boyd, supra*. Here the principal trust is against Helen's transactions."



We lay aside "self dealing" in the strict sense. Appellants misuse the term, we think, in characterizing Mercantile's actions. When a person, natural or corporate, is a party to or otherwise profits from a transaction with a trust or other estate of which he is a fiduciary, as when he buys from or sells to the trust, or acts as a broker in the sale, he is self dealing. The courts generally hold that such a transaction, in the absence of full disclosure and consent of all beneficiaries, is voidable by the beneficiaries, with no need to show unfairness. *McDaniel v. Hughes*, 206 Md. 206, 111 A.2d 204 (1955); *Schockett v. Tublin*, 170 Md. 117, 183 A.521 (1936); *Mangels v. Tippett*, 167 Md. 290, 173 A. 191 (1934).

Mercantile did not buy the Pimlico Race Track property from the Hammond Trust, nor otherwise profit from the sale, except for its commissions as trustee. The sale did not involve any self dealing.

Appellants point to evidence that several members of the Board of Directors of Mercantile had other connections which, appellants contend, showed or raised a presumption that each was subject to conflicting interests which destroyed or impaired his ability to act in the best interest of the Hammond Trust.

Charles E. Rieman was the President of Western National Bank, which was the Jockey Club's principal depository, and which at times made substantial loans to the Jockey Club.

F. Granger Marburg was a partner in the brokerage firm of Alex, Brown & Sons, and as such was a partner of W. Wallace Lanahan. Mr. Lanahan was a member of the board and executive committee of the Jockey Club, and was one of the Jockey Club's two negotiators for the purchase of the Pimlico

Race Track. There was also evidence to indicate that Alex. Brown & Sons owned 350 shares of stock of the Jockey Club, but there was further evidence that the stock had been acquired for Alfred Gwynn Vanderbilt and had been transferred to him.

Edwin F. A. Morgan was a partner in the law firm of Semmes, Bowen and Semmes, and as such was a partner of Lawrence Perin, and shared with him in the fees received by the law firm for its representation of the Jockey Club. Mr. Perin was a member of the board and executive committee of the Jockey Club, and was the Jockey Club's other negotiator for the purchase of the Pimlico Race Track.

J. Edward Johnston personally owned 100 shares of stock of the Jockey Club.

Messrs. Rieman, Marburg, Morgan, and Johnston were members of Mercantile's board of directors. Messrs. Rieman and Johnston were members and Messrs. Marburg and Morgan were associate members of the executive and of the trust investment committees.

There was evidence that Mercantile held, in various trusts or in agency accounts, some 950 shares of stock of the Jockey Club. Mr. Vanderbilt owned a majority of the Jockey Club's 4,540 outstanding shares.

The evidence showed that in 1946 a question which had become of significant importance was the adequacy of the physical facilities at Pimlico, and the feasibility of improving them, or of moving to a different location. The then current lease would have expired in 1949. The Jockey Club suggested a price of $700,000.00. Mercantile informed Mrs. Madden, the life beneficiary, who was then thought by some to be the sole party in interest, because of her renunciation of the power of appointment in her father's will. Her personal attorney was also kept informed. She declined to consider the offer of $700,000.00.

Later in 1946 Mercantile arranged to have a Mr. Gilbert, a well known real estate appraiser in Baltimore, appraise the land.



He valued it at $540,000.00. A Philadelphia engineering firm, suggested by Mrs. Madden's attorney, made a study primarily, to determine what it would cost the Jockey Club to relocate its racing operation, and to duplicate Pimlico's physical facilities at a new location. One of the conclusions of that study was that the improvements at Pimlico could be reproduced new at a cost of approximately $1,600,000.00, and that their current depreciated value was $1,000,000.00. Mercantile noted that the value of the Pimlico property, at least by one approach, was indicated to be $1,540,000.00.

Mercantile also approached the question of value in other ways. It made studies by capitalizing rents, adjusted for what it considered to be valid factors, using several different assumed rates of return. Possible values ranged up to a figure in excess of $2,000,000.00. There was other evidence at the trial indicating even higher values. Mercantile concluded that $1,500,000.00 was a reasonable value. It put that figure to the Jockey Club as an asking price.

Other factors affecting value which were shown by the evidence were that the Jockey Club, not the trust, owned the names of several well known stakes races run at Pimlico, most famous of which was the Preakness. The Jockey Club, not the trust, was the licensee for conducting horse racing at Pimlico. State laws then in effect froze major racing at mile tracks in Maryland at the existing four locations, so that each party was, in many ways, compelled to deal only with the other.

The General Assembly session of 1947 saw indications of change. A bill was introduced which would authorize any of the four major licensees to conduct racing at a different location, but which would still limit the number of licensees to four. The parties met as adversaries in the lobbies and halls of the State House. Intensive lobbying activities were conducted on behalf of each. As the session was nearing its end, the lobbyists for Mercantile were successful in bringing about an amendment to the bill which would permit a licensee to relocate, but would then permit racing at five locations. The amendment was passed by the Senate on second reading by a vote of 15 to 13.

It was clear that if that amendment became a part of the law, the owner of Pimlico Race Track would have to deal with a tenant which had alternatives. The Jockey Club could stay, under a new lease, or it could relocate. If it relocated, the trust would be required to seek another operator, one which could obtain a license, and which could then conduct horse racing at Pimlico. Pimlico would then be one of five, rather than four, major tracks in Maryland. If the amendment failed of final passage, the owner of Pimlico would have little more than a piece of real estate, appraised at slightly over one half of a million dollars.

Before the Senate Bill came up for third reading, a memorandum of agreement was reached by negotiators for the Jockey Club and Mercantile. The Jockey Club would buy the property for $1,115,000.00.

There was evidence that Mercantile did little or nothing to find or interest other possible purchasers. There was evidence that it did little or nothing to exploit indications of interest from other sources.

In *Cumberland Coal and Iron Co. v. Parish*, 42 Md. 598 (1875), Judge Alvey, speaking for the Court of Appeals, said, at 604-07:

> "It appears that at the time when the mortgage sought to be enforced was made, and for some time previous, Sherman, the mortgagee, was not only one of the directors, but was a member of the executive committee; and also financial agent of the company, the mortgagor. There is therefore no question as to the fact that Sherman bore an important fiduciary relation to the company, as well as one of trust and confidence in the general control and management of its affairs. Holding such relation, he was bound to exercise all the power and authority delegated to him, in conjunction with others, for the protection of the property, and the promotion of the best interest of the



corporators, the stockholders, according to his skill and ability. As between trustee and *cestui que trust*, or agent and principal, the rule is inflexible, that the trustee or agent cannot be allowed to take the benefit of a transaction the entering into which was in violation of his duty, or where the benefit claimed and the duty required to be performed are in any respect inconsistent, the one with the other. The rule is founded on considerations of public policy, having in view the great difficulty, which must always exist in such cases, of obtaining clear and satisfactory evidence of the fairness of the transaction, and of the entire absence of all abuse or advantage taken of the confidence reposed in such trustee or agent. And it is now well settled that directors and managers of corporations, and other companies, are equally within the rule which guards and restrains the dealings and transactions between trustee and *cestui que trust*, and agent and his principal; such directors or managers being in fact trustees and agents of the bodies represented by them. *Att'y Gen. v. Wilson*, 1 Cr. & Phil. 1; *Benson v. Heathorn*, 1 Y & Coll. 326; *R. R. Co. v Hudson*, 16 Beav. 485; *R. R. Co. v. Blaikie*, 1 Macq. 461; *R. R. Co. v. Magnay*, 25 Beav. 587; *Hoffman Coal Co. v. Cumb. C. & I. Co.*, 16 Md. 456, and *Same Case*, in 20 Md. 117.

"The affairs of corporations are generally intrusted to the exclusive management and control of the board of directors; and there is an inherent obligation, implied in the acceptance of such trust, not only that they will use their best efforts to promote the interest of the shareholders, but that they will in no manner use their positions to advance their own individual interests as distinguished from that of

the corporation, or acquire interests that may conflict with the fair and proper discharge of their duty. The corporation is entitled to the supervision of all the directors, in respect to all the transactions in which it may be concerned; and if one of the directors is allowed to place himself in the position of having his conduct and accounts made the subject of supervision and scrutiny, he, of course, cannot act, in regard to those matters, both for himself and the corporation; and the consequence is, that the corporation is deprived of the benefit of his judgment and supervision in regard to matters in which such judgment and supervision might be most essential to its interest and protection. Not only this, the remaining directors are placed in the embarrassing and invidious position of having to pass upon, scrutinize and check the transactions and accounts of one of their own body, with whom they are associated on terms of equality in the general management of all the affairs of the corporation. The design of the rule, therefore, is to secure a faithful discharge of duty, and, at the same time, to close the door, as far as possible, against all temptation to do wrong, by subjecting the transactions between parties standing in such confidential relations, to the most exact and rigid scrutiny, whenever such transactions are brought in question before the courts.

"The transaction may not be *ipso facto* void, but it is not necessary to establish that there has been actual fraud or imposition practiced by the party holding the confidential or fiduciary relation; — the *onus* of proof being upon him to establish the perfect fairness, adequacy, and equity of the transaction; and that too by proof entirely independent of the instrument under which he may claim. This is required, upon the general principle, 'that he who



bargains in a matter of advantage with a person, placing confidence in him, is bound to show that a reasonable use has been made of that confidence; a rule applying equally to all persons standing in confidential relations with each other. If no such proof is established, Courts of Equity treat the case as one of constructive fraud.' 1 Story's Eq. sec. 311, 321, 322; *Pairo v. Vickery*, 37 Md. 467."

The Court of Appeals in *Hammond v. Lyon Realty Co.*, 163 Md. 442, 163 A. 480 (1932), entered its judgment in a majority per curiam order. In a separate plurality opinion Judge Parke, after citing and quoting from *Cumberland Coal and Iron Co. v. Parish, supra*, said, at 469–70:

"The principle adopted by our predecessors has merits which should prevent any departure, since it serves, not only to check the cupidity of corporate fiduciaries and to remove the difficulty of obtaining evidence of wrongful conduct by declaring presumptively fraudulent the questioned transactions, but also to assure protection and permanency to just corporate transactions by making this presumption rebuttable, upon the production by the fiduciaries of proof which clearly establishes that the transactions are fair, honest, and equitable.

"The more drastic doctrine enforced in other jurisdictions has, apparently, not been more effective than that of this tribunal in the prevention of breaches of duty by the fiduciaries of corporations; and is furthermore open to the practical objection that its tendency is to deprive the corporation of the aid, in its financial affairs, of those best advised of the necessity for the aid and most interested in giving it, with judgment, according to the exigencies of the situation."

In the case now before us there was evidence at the trial which, viewed most favorably to the counter-complainants, coupled with reasonable inferences from the evidence, could have permitted a trier of fact to find the fair value of the asset sold to be within a wide range of indicated values. There was evidence from which a trier of fact could find that Mercantile used due diligence and exercised good judgment under all the circumstances, but the evidence would likewise permit finding that Mercantile failed to use the required diligence and good judgment in selling the trust asset. There was evidence of potential for conflicts of interest, from which a trier of fact might infer that conflicts did, or might infer that they did not, result in a less than adequate price by affecting the quality of diligence and judgment with which the sale was made.

A ground argued below by Mercantile in support of its motion to dismiss was that whatever rights the counter-complainants may have had could not now be asserted, because of laches. The chancellor did not find it necessary to decide the point.

We point out first that any laches which could have been chargeable to Mrs. Audrey Madden, the life beneficiary, cannot be charged to the counter-complainants. In *Zimmerman v. Fraley*, 70 Md. 561, 17 A. 560 (1889), the Court of Appeals said, at 571:

> "It is unnecessary to advert to the testimony bearing upon the alleged acquiescence of Mary A. Fraley, the *censtui que trust* for life, because no mere acts of hers, however clearly established, could be binding on the persons entitled to the remainder."

There were some conflicts in the evidence below as to when counter-complainants first became aware of the facts upon which their claims are based but certainly it could not be held as a matter of law that they slept on their rights.

In short, the critical decision in this case was for the trier of the facts, and could not be resolved on the basis of sufficiency as a matter of law. We hold that the chancellor erred in granting Mercantile's motion to dismiss.



## THE TESTIMONY OF APPELLANTS' EXPERTS

A further question for our review is whether the chancellor abused his discretion in striking the testimony of John N. Menges and George Weinstein, expert witnesses for appellants. At the trial, it was proferred that Mr. Menges would give his opinion as to the cost of reproducing Pimlico Rack Track as it existed in 1947, and that Mr. Weinstein would give his opinion as to the "going concern" value of the Hammond Trust's interest in Pimlico. The chancellor ruled that although both witnesses were qualified as experts in their fields, he would admit their testimony subject to general exceptions because it was not clear, at the time of the proffers, that these witnesses had sufficient knowledge of the particular property in question to render an opinion useful to trier of fact.[3] In his oral opinion of 27 June 1973, the chancellor granted Mercantile's motion to strike the testimony of both witnesses.

In *State, Use of Stickley v. Critzer*, 230 Md. 286, 186 A.2d 586 (1962), the Court of Appeals reviewed various methods for qualifying an expert witness. At 289-90, it said:

> "This Court has had occasion to deal with expert and opinion testimony many times. Of the principles that have been enunciated in the cases from time to time, no two are more firmly established than (1) that an expert witness must predicate his opinion on premises of facts, and (2) that the questions of the qualifications of an expert and whether or not his opinion will help the trier of facts appreciably are largely in the discretion of the trial court.
>
> "The premises of fact may, or may not, include some of the reasons upon which the expert bases his

[3]Audrey Cosden, Michael Madden and Christina Madden argue that the chancellor admitted the testimony of Mr. Menges subject only to a reservation as to the weight it would be given. The transcript, however, shows that the chancellor almost immediately retracted that ruling and admitted Menges' testimony subject to a general exception.

opinion. And they must disclose that the expert is sufficiently familiar with the subject matter under investigation to elevate his opinion above the realm of conjecture and speculation, for no matter how highly qualified the expert may be in his field, his opinion has no probative force unless a sufficient basis to support a rational conclusion is shown. The opinion of an extremely competent real estate appraiser as to the value of a certain tract of land, for instance, would have little, if any, probative force, if the expert had never seen the tract and had no knowledge of its location, or the properties surrounding it. The premises of fact may be within the personal knowledge of the expert, or an assumed set of facts (resulting in a hypothetical question). *Marshall v. Sellers*, 188 Md. 508, 519, 53 A.2d 5. Ordinarily, the premises of fact are adduced before the expert is permitted to state premises of fact are adduced before the expert is permitted to state his opinion. *Mangione v. Snead*, 173 Md. 33, 195 A. 329. However, they may be contained in a proffer of proof to follow, which proffer, of course, must be fulfilled, otherwise the opinion will be subject to a motion to strike it out. 32 C.J.S., *Evidence*, § 552."

And in *Casualty Insurance Co. v. Messenger*, 181 Md. 295, 29 A.2d 653 (1943), the Court of Appeals said, at 298:

> "It is a familiar rule of evidence that a witness, in order to qualify as an expert, should have such special knowledge of the subject on which he is to testify that he can give the jury assistance in solving a problem for which their equipment of average knowledge is inadequate."

In reviewing the chancellor's conclusions that both expert witnesses in the case before us lacked the requisite special knowledge to qualify as experts, we have examined the testimony of each of them which we summarize here.



It cannot be disputed that for the past 15 years, Mr. Menges has been one of the country's leading authorities with regard to the design and construction costs of race tracks. The issue here, however, is not bounded by the field of his expertise in general. It was proffered that Mr. Menges could estimate the cost of reproducing Pimlico Race Track as it existed in 1947. In gauging his qualifications we therefore look to his knowledge of this particular track at a specific period in its history. Mr. Menges admitted that he had no first hand knowledge of Pimlico in 1947, nor, for that matter, in 1973. He had not heard any testimony in the case, but based his opinion entirely on certain reports provided to him from Mercantile's files relating to the Hammond Trust.

The Court of Appeals in *Consolidated Mechanical Contractors, Inc. v. Ball*, 263 Md. 328, 283 A.2d 154 (1971), said at 335-36:

> "It is generally true that the opinion of an expert may not be based in whole or in part on the opinions, inferences and conclusions of other witnesses, *Jackson v. Jackson*, 249 Md. 170 (1968); *Mt. Royal Cab Co. v. Dolan*, 168 Md. 633 (1935); *Quimby v. Greenhawk*, 166 Md. 335 (1934), nor on reports and examinations of others if they contain only opinions, inferences or conclusions. *Pennsylvania Threshermen & Farmers' Mut. Cas. Ins. Co. v. Messenger*, 181 Md. 295 (1943); *Equitable Life Assur. Soc. v. Kazee*, 257 Ky. 803, 79 S.W.2d 208 (1934); *Robertson v. Coca Cola Bottling Co.*, 195 Ore. 668, 247 P.2d 217 (1952). *See also* 2 Wigmore, *Evidence* § 657 (3d ed. 1940); *McCormick on Evidence* § 15 (hornbook series 1954); 31 Am. Jur. 2d *Expert and Opinion Evidence* § 42 (1967); 19 A.L.R.3d 1008. But it is true also that an expert witness who has heard the entire testimony in a case and who assumes the truth of it all, where it is not conflicting, may base his opinion upon *facts* testified to by other witnesses, or upon *facts*

contained in reports or examinations made by third parties. *Wilhelm v. Burke*, 235 Md. 412 (1964); *State ex rel. Solomon v. Fishel*, 228 Md. 189 (1962); *Ihrie v. Anthony*, 205 Md. 296 (1954); *Bethlehem-Sparrows Point Shipyard, Inc. v. Scherpenisse*, 187 Md. 375 (1946); *Langenfelder v. Thompson*, 179 Md. 502 (1941). Admittedly it is often hard to draw the line between fact and opinion. The usual objection seems to be based on the premise that heresay will be the foundation of the opinion. While there is considerable authority to the contrary we think there is support for the view that such opinion evidence, in some circumstances, may be admissible, for instance where such reports are relied on by the experts in the practice of his profession. *See McCormick on Evidence* § 15 (hornbook series 1954), and 3 Wigmore, *Evidence* § 688 (Chadbourn rev. 1970)."

Where an expert relies on reports of others, he must demonstrate to the court not only that the reports were made in a reliable manner, but that they are reliable sources of information for the purposes to which the expert puts them.

Mr. Menges relied almost exclusively on insurance appraisals of Pimlico Race Track made in 1928, 1937, and 1946 to determine what improvements existed at the track in 1947. The appraisals did not purport to show all of the improvements, did not purport to show what those improvements were constructed of, i.e., brick, wood, steel, nor did they purport to show the condition of those improvements in 1947. Mr. Menges admitted he had no personal knowledge of the reliability of the firms making the appraisals, nor could he supply any of the information lacking in those reports. He recognized that there were discrepancies among the reports, and, since he had no means of ascertaining which report was accurate, he averaged the appraised values in the reports.



The one report which was prepared for the purpose of ascertaining replacement costs of Pimlico Race Track was not relied on by Mr. Menges, but was rather attacked by him. Mr. Menges disregarded the allowance for depreciation as reflected in that report on two theories. First, since Pimlico was drawing large crowds, any obsolescence in the design must have been an attraction rather than a depreciation in the value of the buildings. This statement only further evidences a lack of knowledge of the track as it existed. It does not take into account that people may have been attracted in spite of the inconveniences, or that even larger crowds might have been attracted if those inconveniences were eliminated, and it flies in the face of evidence by other witnesses and testimony that *because* of its obsolescence, there were serious proposals in official circles to discontinue racing at Pimlico Race Track.

Mr. Menges' second reason for discounting depreciation was that he said that increased building costs offset any depreciation. Thus in estimating replacement costs he treated the improvements as new in 1947. While it is true that in some cases increased costs will offset depreciation, it does not follow that all buildings should be valued at what they cost, regardless of their age or condition, especially when Mr. Menges had already attempted to adjust his figures to reflect current 1947 costs. It has long been the rule in Maryland that valuations by real estate experts that do not reflect depreciation of the property are inadmissible. *Stickell v. City of Baltimore*, 252 Md. 464, 250 A.2d 541 (1969).

Without deciding whether Mr. Menges was proffered as a real estate expert to give a fair market value for the property, we conclude he could be of no assistance to a trier of fact in estimating the replacement costs of the improvements at Pimlico Race Track as they existed in 1947. He treated all of the improvements as new when in fact they were not and he used the reports of others without making the requisite showing of reliability. We can find no abuse of discretion by the chancellor in striking his testimony.

Appellants' second expert witness, Mr. Weinstein, is an expert in the field of race track accounting. Although it was proffered that Mr. Weinstein would testify as to the fair market value of the Hammond Trust's interest in Pimlico Race Track as a going concern, he approached his task by totally ignoring the Jockey Club's interest in the operation of the race track. On cross examination, when asked what value he attributed to the Jockey Club assets, the amount to be deducted from the fair market value of the total entity, Mr. Weinstein's repeated answer was zero or none. He gave no consideration to the fact that if Pimlico had a reputation as a great race track, part of that reputation should have been attributed to the group that had managed and opreated the track for the 70 odd years of racing at Pimlico.

Essentially, Mr. Weinstein's approach was to examine other race track operations in the country in 1947. By comparing those tracks' profits against the price of the stock in those tracks, he arrived at a figure which he thought was a conservative multiple to be applied to the profits of Pimlico. He then adjusted the profit reports of the Jockey Club for 1944, 1945, and 1946, to eliminate excess profit taxes and rents, and to add back in certain items which he considered to be capital expense. Even if we assume that Mr. Weinstein's method was reliable from the standpoint of good accounting procedures (we assume they were since Mr. Weinstein was eminently qualified), the witness himself admitted that certain calculations were based on intuition and others were wrong. These admitted errors affected both sides of Mr. Weinstein's comparisons. Because of them, it became under what multiple, if any, was appropriate, and if a proper multiple could be determined, to what profit dollar figure it should apply.

Perhaps one of the most difficult aspects of ascertaining the value of the Hammond Trust's interest in Pimlico Race Track was the weight to be given the fact that while the trust apparently owned the right to the name Pimlico, the Jockey Club owned all interests in the names Preakness, The Futurity,

By his order, the chancellor determined that under the circumstances here, monitoring the inspection of the trust records involved extraordinary expenses beyond those ordinarily compensated for by a trustee's commission. We cannot say that in ordering the proration of costs among the participating beneficiaries the chancellor abused his discretion. He retains, of course, the authority to rule on the reasonableness of the actual costs incurred when Mercantile submits its claim.

## CHARGING MERCANTILE'S EXPENSES AND COUNSEL FEES

In view of our holding that the chancellor erred in granting Mercantile's motion to dismiss, his order deciding, in principle, that Mercantile shall be awarded costs, expenses, compensation and attorney's fees incurred in defending the counterclaim remains subject to reconsideration by the chancellor. The appropriateness of such an order will depend on the outcome on remand following a full hearing of the case on the merits.

Two contentions in this appeal merit further comment. They relate to Mercantile's employing two separate law firms and to the position of those beneficiaries who declined to join in filing the counterclaim.

Appellant Peter Madden asks this Court to rule as a matter of law that Mercantile should in no event be allowed counsel fees payable to two law firms. The cases from other jurisdictions on which he relies fall short of requiring the ruling he seeks. We read them to hold merely that in allowing attorney's fees a court will not be controlled by the contract between a fiduciary and a law firm, nor will it award fees for a duplication of work by different attorneys. These principles are implicit in the limitation that an award of attorney's fees be reasonable.

With respect to Mercantile's expenses, including attorney's fees, the chancellor ordered that they "should be paid out of and charged pro rata against the respective distributive shares only



of the counter complainants in the trust estate herein, and no part thereof shall be paid out of or charged against the shares of Anne Hallenbeck or Jane Humphreys." In oral argument here, appellants conceded that the beneficiaries named have not participated in prosecuting the counterclaim, and that, therefore, their shares should not be diminished by any costs of the countersuit, regardless of the outcome. The agreement of all of the parties on this point should be respected on remand if the chancellor determines at the conclusion of the hearing on the merits that the counter-complainants are to bear the costs of reasonable attorney's fees to Mercantile.

## THE COMMISSION TAKEN BY MERCANTILE ON THE SALE

Our decision on the motion to dismiss requires that the order approving the taking of a 2% commission by Mercantile on the sale must remain subject to reconsideration by the chancellor. We do not mean to imply that the order was wrong in the context in which it was entered. Rather we recognize that if the case is decided against Mercantile on the merits the equitable considerations may change.

Appellants argue that at the time Pimlico was sold, Mercantile had no right to pay itself a commission without an appropriate court order, and therefore the 2% commission should now be disallowed. The chancellor heard arguments on this point. In an 11 July 1973 ruling he indicated that he need not decide whether submission to a court was necessary in 1947. The chancellor ruled that if the issue had been submitted to a court of equity, the 2% commission would have been approved.

The applicable statute appears as Section 199(d) of Article 16 of the 1957 Annotated Code of Maryland, which is identical to the statute in force in 1947.[4] Section 199 sets forth certain

[4]Article 16, § 280 of the 1939 Code.

commissions to which trustees were entitled for their administrative services, including in subsection (d):

> "For selling real or leasehold property, a commission upon the proceeds of such sale at such rate as may be allowed by rule of court or statute, to trustees appointed to make sales under decrees or orders of a court of equity in the county in Maryland where such real or leasehold property is situated. . . ."

Because Pimlico in 1947 was located in Baltimore City, the applicable rule of court was Rule 20 of the Equity Rules For Baltimore City. In essence, Rule 20 set out a sliding scale for commissions, allowing 2% on proceeds of sales above $25,000 and up to $50,000. Commissions on proceeds exceeding $50,000 were left expressly to the discretion of the court.

Neither the statute nor the rule required conventional trustees to submit their commissions to courts of equity for approval. We interpret them to permit conventional trustees, on their own initiative, to take commissions in conformity with those allowed to trustees appointed to make sales under decrees or orders of courts of equity.

In *Sokol v. Nattans, supra*, Chief Judge Orth for this Court reviewed the law in relation to commissions as authorized under trust instruments and the applicable Maryland statutes. In essence, he said that a trust is a contract and that the intent of the parties to the contract is binding. It is clear that Mr. Hammond intended that the trust be administered by Mercantile free of court supervision. We therefore find nothing in the instrument itself or in the statutes which required Mercantile to invoke the jurisdiction of a court for approval of commissions.

If a commission taken by a conventional trustee without court approval is challenged, as it was here, then the court must determine whether the commission taken was authorized by the instrument, or was within the limits allowed by statute, or was within the customary limits allowed by courts at the time.



Appellants also urge that if they should prevail after a full hearing on the merits, then the commission should be disallowed as a matter of law.

When a breach of trust is established, it is within the discretion of the chancellor to reduce or deny commissions. *Stone v. Stone*, 230 Md. 248, 186 A.2d 590 (1962). Such a reduction or denial, however, is not mandated as a matter of law, as appellants contend; rather it is within the discretion of the chancellor. The reduction or denial of commissions is ordered, not for the purpose of imposing a penalty upon the trustee for his breach of trust, but on the ground that he has not properly performed the services for which he is compensated. III Scott, *Law of Trusts*, § 243 (3 ed. 1967). Thus in many jurisdictions courts have allowed commissions even where there was a breach of trust. In *Diffenderffer v. Winder*, 3 G. & J. 311 (1831), the Court of Appeals reduced a commission to one half of what the chancellor allowed. The Court, however, did not deny commissions totally, even though it found an egregious breach of trust.

## DISMISSAL OF THE JOCKEY CLUB

The motion to amend the mutual dismissal by the appellants and the Jockey Club raised before the chancellor the question whether he should exercise the court's revisory power under Maryland Rule 625 to modify a mutual order of satisfaction and dismissal which originated with the parties. A hearing was held, at which the intent of all parties to the order was shown. The chancellor made a finding as to the authority given by the parties to their counsel, and further found that the order did not go beyond the authority given. He found that there was no fraud, mistake, or irregularity, and thus no justifiable need to modify the order. His findings of intent and authority should bind all parties in this case. He did not err in denying the motion to modify the order.

ORDER OF 13 FEBRUARY 1973 AFFIRMED.

DECREE OF 23 MAY 1974 AFFIRMED, EXCEPT FOR THAT PART WHICH DISMISSED THE COUNTERCLAIM, WHICH IS REVERSED.

ORDER DENYING MOTION TO MODIFY ORDER OF DISMISSAL OF JOCKEY CLUB AFFIRMED.

CASE REMANDED FOR FURTHER PROCEEDINGS IN ACCORDANCE WITH THIS OPINION.

COSTS BELOW TO ABIDE THE RESULT.

COSTS IN THIS COURT TO BE PAID THREE-FOURTHS BY MERCANTILE-SAFE DEPOSIT AND TRUST COMPANY, AND ONE-FOURTH BY APPELLANTS, EXCEPT FOR THE BRIEF OF APPELLEES HUMPHREYS AND HALLENBECK, WHO SHALL PAY FOR THEIR OWN BRIEF.



## MANDATE OF MARYLAND COURT OF SPECIAL APPEALS DATED JULY 14, 1975

**(Filed July 16, 1975)**

**MANDATE**

**Court of Special Appeals of Maryland**

No. 803, September Term, 1974

PETER H. MADDEN et al.

v.

MERCANTILE-SAFE DEPOSIT AND TRUST COMPANY, Trustee, et al.

Appeal from the Circuit Court of Baltimore City.
Filed: November 18, 1974.
November 22, 1974—Court of Appeals order denying Writ of Certiorari.
March 7, 1975—Motion for Correction of an Omission in the Trial Transcript filed by appellant.
March 27, 1975—Motion granted.
June 12, 1975—Opinion by Powers, J. Order of 13 February 1973 affirmed. Decree of 23 May 1974 affirmed except for that part which dismissed the counterclaim, which is reversed. Order denying motion to modify order of dismissal of Jockey Club affirmed. Case remanded for further proceedings in accordance with this opinion. Costs below to abide the result. Costs in this Court to be paid three-fourths by Mercantile-Safe Deposit and Trust Company, and one-fourth by appellants, except for the brief of appellees Humphreys and Hallenbeck, who shall pay for for their own brief.
July 14, 1975—Mandate Issued.

STATEMENT OF COSTS:

In Circuit Court:

Record ..... 1,200.00
Stenographer's Costs ... 5,417.25
5,417.25

In Court of Special Appeals:

Filing Record on Appeal ..... 20.00
Printing Brief for Appellant ..... 5,945.08 (1,235.48)
Reply Brief ..... 1,114.99 (4,709.60)
Portion of Record Extract—Appellant .....
Appearance Fee—Appellant .....

Printing Brief for Appellee .....2,035.99
(1,950.04 Mer.-Sf. Dp.)
Portion of Record Extract—Appellee ..... 85.95
Appearance Fee—Appellee .....

*STATE OF MARYLAND, Sct:*

*I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Special Appeals. In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Special Appeals, this fourteenth day of July A.D. 1975*

/s/ Julius A. Romano

*Clerk of the court of Special Appeals of Maryland.*

Costs shown on this Mandate are to be settled between counsel and NOT THROUGH THIS OFFICE



## OPINION OF BALTIMORE CITY CIRCUIT COURT DATED JUNE 27, 1973

In The Circuit Court of Baltimore City
112A/382/ A-52662

Mercantile-Safe Deposit & Trust Company, Trustee u/w of William R. Hammond v. Audrey Cosden, et al.

Peter H. Madden, Audrey Cosden, Michael Madden and Christina Madden v. Mercantile-Safe Deposit & Trust Company, Trustee u/w of William R. Hammond and The Maryland Jockey Club of Baltimore City.

**(Filed October 1, 1974)**

**PROCEEDINGS**

(T.14—46) June 27, 1973

(The Court) Mr. Parker, I have two questions I would like to ask you, if I may, to clarify two points. With respect to the bonds, what are the facts in evidence on which the Counter-Complainants rely and what is their theory on that point?

(Mr. Parker) Your Honor, I don't think the bond issue has been particularly well-explored. We did not want to have it made the thrust of the case, merely by the bond issue which involved such a little bit of dollars. We had two documents in evidence. One is the letter from Mr. Madden, Mr. Jay Madden, to the Bank back in 1932 or 1933, and the other is a responsive letter from the Safe Deposit.

(The Court) I recall reading Mr. Madden's letter. I am not sure I recall the response. What was the essence of that?

(Mr. Parker) It is Exhibit Number 102.

(The Court) Was it merely explaining it?

(Mr. Parker) Types of bonds, your Honor. To be perfectly candid, I don't believe we have sustained the (T.14—47) burden

in making the point relating to the bonds. Due to the press of time, we just didn't have the opportunity to explore it fully. There are other documents in the Mercantile's files, but we never really had an opportunity to dig them out to sustain the point, and I think we are prepared to waive it.

(The Court) And what is the theory of the Counter-Complainants—This is question number two—with respect to the commissions on the sale?

(Mr. Parker) I have some rather detailed legal material on that, your Honor. The theory is that the statute in force at that time regarding commissions to trustees, to which Mr. Eney alluded in his argument on his motion, provided that commissions in effect at that time were governed by the rules of Court, and the local rules of Court in effect in 1947 required court approval of those commissions, and for sales above $50,000.00 no set percentage was set and it required court approval on the commission. No such court approval was sought and none received, and for that reason the commissions are void or must be refunded. I think we are very strong on that point, you Honor. I have copies in my office, unfortunately not with me, of the 1939 rules of Court which were in (T.14—48) effect in 1947. I might add that the same rule of court was re-adopted by this Court, I believe, in 1951 or 1952.

(The Court) Does that rule apply to a conventional trustee who is not administering under the supervision of the Court?

(Mr. Parker) Yes, your Honor, it does by its very terms, and the statute also makes that very clear. Mr. Eney's argument in answer to it, as I remember it, was something to the effect that rules regulating commissions in 1947 did not apply to trusts which started in 1908, but I think the response to that is obvious. Number one, it obviously applies, but, number two, the Mercantile or the Safe Deposit was constantly taking advantage of the statute itself over the years which have increased commissions on estates, and they don't take the position if your estate started in 1908 or the trust started in 1908



that the commission rate as increased by the 1939 Legislature—that they aren't entitled to the higher commissions on the 1908 trust, so that I think it is clear that this statute and this rule of Court applied in 1947.

(The Court) Well, there was no reference in the written memoranda as to authorities on that point. I (T.14—49) recall Mr. Eney's brief treatment of it in his argument, and I have not taken the time to do any independent research or ferret out the authorities myself.

(Mr. Parker) Your Honor, I will send you over what I have.

(The Court) I won't be able to deal with that aspect of this case this morning. If counsel will submit memoranda of law on that, we can deal with it at a later stage. Thank you, Mr. Parker.

I have spent the last two days and nights reviewing the exhibits and my notes of the testimony, and considering the memoranda filed by the parties and the applicable authorities. I am now prepared to rule on the several motions made at the conclusion of the Counter-Complainants' case.

The first to be dealt with, or which will be dealt with, is the motion to strike Paragraph 35 of the Third Amended Counter-Claim, under Rule 301(i). This motion is granted. The allegations in this paragraph are, in the words of the Rule, "unnecessary, impertinent, scandalous, irrelevant and improper", and totally unsupported by the evidence.

The next motion is a motion to strike the (T.14—50) testimony of Mr. Menges. This motion is granted for two principal reasons. First, there was insufficient foundation demonstrated by Mr. Menges to permit him to give an opinion as to reconstruction value of the improvements. He conceded that he was unfamiliar with the actual improvements, and the method he used to compensate for this lack of knowledge and information was unsatisfactory and unreliable; that is, the averaging of the amounts contained in four reports, the validity and interpretation of which were unknown to Mr. Menges and

not demonstrated to the Court. Any opinion built on so flimsy a foundation could only be classified as speculative and conjectural and, therefore, without any probative value at all.

Furthermore, if it were a sound opinion as to reconstruction cost, it would be inadmissible without accompanying depreciation under Stickell v. Mayor and City Council, 252 Md. 464. Mr. Menges' explanation that future escalation of construction costs offsets past depreciation is nonsensical.

The motion to strike the testimony of Mr. Weinstein is likewise granted. He demonstrated insufficient foundation to give a reliable opinion as to value using any (T.14—51) approach because of his ignorance of a number of factors, including the premises to be appraised, local racing industry facts, local law and regulatory system with respect to racing, and Senate Bill 101, which was probably the most important single factor in the mix from which the price was determined. The only knowledge of a reliable character which he utilized were the Haskins & Sells financial statements of the operations of The Maryland Jockey Club.

Secondly, he used an unacceptable method of valuation. Admittedly, he was not a real estate valuation expert. The theory that value of land and buildings thereon adapted to a particular business can be appraised or evaluated by valuing the business entity which operates the business on, but does not own the premises, has no foundation in law, business or common sense.

In summary, with respect to both experts, although each was qualified in his respective field of endeavor, neither demonstrated the minimum knowledge and command of reliable information requisite to render an admissible expert opinion under the general principles summarized in State, Use of Stickley v. Critzer, 230 Md. 286, (T.14—52) at pages 289 and 290, and State Health Department v. Walker, 238 Md. 512, at pages 520 through 522. Neither used a legally acceptable method of evaluation.



The next motion to be dealt with is the motion to strike Counter-Complainants' Exhibits 122, 123, 124 and the five proffered but unnumbered exhibits. This motion is granted. None of these proffered exhibits is relevant to any issue in this case.

The final motion to be dealt with is the motion to dismiss under Maryland Rule 535 on the ground that upon the facts and law the Counter-Complainants have shown no right to relief. The standard to be applied in testing the sufficiency of the evidence at this stage of the trial is the same as that applied on motion for directed verdict in a jury trial; that is, the evidence and all reasonable and logical inferences deducible therefrom must be viewed in the light most favorable to the Counter-Complainants. Shoreham Developers, Inc. v. Randolph Hills, 248 Md. 267, and Isen v. Phoenix Assurance Co., 259 Md. 564.

The Counter-Complainants take the position, as I understand it, that the burden of explanation and persuasion (T.14—53) is on the Trustee under (a) general principles of trust law, and (b) because of the so-called conflicts of interest arising out of the fact that the Trustee held stock in Maryland Jockey Club in a fiduciary capacity in several other trust and agency accounts at the time of the sale.

As to (a), the general principles of trust law which are applicable between trustees and beneficiaries are set forth by Judge Singley in Lopez v. Lopez, 250 Md. 491, at page 501. There it was held that a beneficiary seeking to attack a transaction of the trustee must allege and prove prima facie a duty on the part of the trustee and a dereliction of the duty before the trustee is required to go forward with the evidence. Proof of doubts and obscurities alone is insufficient to shift the burden of proof to the trustee, except in a formal trust accounting proceeding, as distinguished from an attack by the beneficiary on transactions of the trustee. This is not a formal accounting proceeding.

With respect to (b), the so-called conflict of interest, no Maryland case or statute has been cited and none found which prevents a trustee from selling a trust asset to a corporation, minority stock of which is held by it as trustee (T.14—54) or agent in other fiduciary accounts, or which places any special burden of explanation on the trustee in connection with such a transaction. Even where the trustee owns the stock of the buying corporation in its own right, the propriety of the transaction is only brought into question when the trustee holds the entire or controlling interest or such a substantial interest that there would be a temptation to consider its own advantage in making the sale and not consider solely the advantage to the beneficiaries of the trust. Scott on Trusts, Section 170.10 and .11. There is no analogy between a sale to a corporation in which the trustee has a personal interest and a sale to one in which his interest is solely as a fiduciary, for even if the holding is substantial in the latter case there is no risk of temptation to disloyalty. What profit is there to the trustee in favoring one trust over the other when he has no beneficial interest in either?

It is for this reason undoubtedly that the law permits a common trustee to sell from one trust to another, so long as the transaction is fair to both. Scott on Trusts, Section 170.16. Even the critics of this Rule would be hard put to find fault or risk of favoritism in a sale by a trustee (T.14—55) to a corporation in which it holds minority interests in other trusts. The criticism of the Rule is that it is difficult to justify a sale by one trustee to himself, albeit in a dual trust capacity, because of the difficulty of obtaining the highest price for the seller trust and at the same time the lowest price for the buyer trust, when the trustee is the sole negotiator. However, in the minority holding situation, the trustee is not negotiating with himself, but with the management of the corporation which clearly has an adverse interest. The other so-called interlocking relationships have no bearing on burden of proof or going forward with the evidence and, therefore, will not be dealt with here, but infra.

Thus in this case it is necessary at this stage of the trial for the Counter-Complainants to have produced prima facie proof of dereliction of duty.



The several claims made in the Third Amended Counter-Claim will be dealt with separately.

The first is the complaint that the Trustee was negligent in failing to preserve the capital value of the Pimlico Race Track by establishing an adequate depreciation reserve from income. The facts are clear—no such reserve (T.14—56) was established. The short answer is that the law at the least required no reserve and at the most forbade it.

The claim with respect to the bonds has been abandoned by the Counter-Complainants, and I had concluded from what evidence I could find in the case that the CounterComplainants, as they now concede, had failed to make out a prima facie case with respect to those bonds.

With respect to the claim regarding the corpus commission on the sale of the Pimlico Race Track, as indicated at the outset, decision will be reserved pending receipt of memoranda from the parties.

On the fourth and principal claim, it is alleged that in dereliction of its duty the Trustee sold Pimlico Race Track for an inadequate price. As specific items of dereliction, the Counter-Complainants list:

One, the Trustee in capitalizing rents instead of capitalizing earnings of The Maryland Jockey Club negligently selected an improper method of valuation.

Secondly, the Trustee failed to solicit purchasers by advertisement or otherwise, and, thirdly, the Trustee failed to follow up and develop bids by others, but (T.14—57) limited itself to dealing with The Maryland Jockey Club.

As evidence of sale for an inadequate price and dereliction of duty in the method of sale, the Counter-Complainants point inter alia to, one, the 1947 tax assessment of the land and improvements in the amount of $1,165,800.00; the mortgage requirement that the purchaser-mortgagor insure the buildings on the property sold on a ninety percent co-insurance basis in the amount of $1,800,000.00; the Frainie Brothers insurance

valuation of 1946 of the buildings on the premises; the sum in the Racing Fund attributable to the operation at Pimlico in the amount of $444,198.00; the fact that there was no advertising of the sale in the conventional sense; the fact that there are memoranda from the Trustee's files which appear to be of telephone conversations or other inquiries concerning possible offers to buy Pimlico with no evidence of follow up by the Trustee; the offer of Hugo Hoffmann to purchase the track for $1,500,000.00; the so-called interlocking relationships involving various participants in the total transaction; the lack of complete explantion by employees of the Trustee called by the Counter-Complainants and by Mr. Perin of all of the negotiations or (T.14—58) negotiating sessions between the parties; lack of appraisals obtained from other than Day & Zimmermann and Gilbert; supposed flaws in methods of valuations gleaned from memoranda of various types found in the Trustee's files, and apparent insufficient importance attached to the value of the name Pimlico and Pimlico Race Track.

The traditional standard of conduct required of a trustee is that he exercise that degree of care and skill that a person of ordinary prudence would employ in dealing with his own affairs. It has been suggested that when a trustee has a greater skill or more facilities than an ordinary prudent person, he must employ them in conducting trust business, particularly where he regularly holds himself out as having special skills, experience and facilities. Scott on Trusts, Section 174.1. If a trustee fails to exercise the proper standard in selling trust assets and, as a result, obtains an inadequate price, he is subject to surcharge for the difference between the price received and the true value of the asset, and if the asset was sold to other than a bona fide purchaser for value the sale may, in the alternative, be set aside.

(T.14—59) In this case, viewing the evidence in the light most favorable to the Counter-Complainants, there is not a scintilla of competent evidence from which it could be found that the Trustee, in conducting the sale of the Pimlico Race



Track, failed to exercise the highest degree of care mentioned above. The very most that the Counter-Complainants have shown, giving full credence to all their evidence, are doubts and obscurities which, under Lopez, are insufficient to shift the burden of proof of going forward with the evidence to the Trustee.

The witness produced by the Counter-Complainants who gave from his personal knowledge, in some measure recently refreshed, the most complete and cohesive picture of the negotiations, the sale and the surrounding circumstances, was Lawrence Perin, a highly regarded and respected member of the Bar. From the testimony of Mr. Perin, who was the Counter-Complainants' witness, it is clear that the sale was an arms length transaction in which there were heated and hard-fought negotiations between the Trustee, represented by its top officers, seeking the highest possible price on the one hand, and Maryland Jockey Club, represented by Mr. Perin and Mr. (T.14—60) Lanahan, seeking the lowest price on the other. Mr. Perin, as did other witnesses called by the Counter-Complainants, flatly denied any intrusion into the transaction of selfish considerations arising out of the so-called interlocking relationships. There is no room left for inference that such relationships in any manner tainted the transaction.

As pointed out in essence in Kramme v. Mewshaw, 147 Md. 535, the best evidence of value is the result of the battle of wits between the buyer and the seller, and that is particularly true where, as here, over a quarter of a century has passed since the sale. The evidence produced by the Counter-Complainants shows that not only did the Trustee throw its President, Executive Vice President and head of the Trust Department into the battle, but when it appeared that pending legislation, if passed, would for all intents and purposes strip the asset of its utility as a race track and thus reduce its value by at least half, maybe two-thirds, it engaged a legislative representative to shore up its defenses on that front.

In the light of all of the evidence concerning the actual negotiations, and the actions on both sides in (T.14—61) connection therewith, it is neither logical nor reasonable to infer from such items as tax assessments, insurance valuations, insurance requirements in mortgages and the like, that the price agreed upon was inadequate, nor is it reasonable or logical to infer from the documents and memoranda taken from old files that the Trustee failed to diligently pursue every inquiry made by prospective purchasers. The failure of Hoffmann to meet the Trustee's terms of sale adequately explains the termination of negotiations with him. In view of the wide publicity given to the availability of the track for sale, it cannot be inferred that conventional advertising would have produced a buyer at a higher price. The evidence is insufficient to show the Trustee was not adequately informed as to the value of the Race Track property, including the names appurtenant thereto and the money in the Racing Fund. Under the statute and existing legislative climate, the trust at best had an argument that the money could only be used at Pimlico even if The Maryland Jockey Club moved to another location.

The Court is not required to look with suspicion upon or read evil intent or motive into every un- (T.14—62) explained circumstance disclosed. What is required is that the evidence and all inferences reasonably and logically deducible therefrom be viewed in the light most favorable to the Counter-Complainants.

While there is evidence that, unknown to the Trustee, Maryland Jockey Club's representatives had authority to pay as much as $1,300,000.00, if necessary, this does not prove that the lower price agreed upon after further negotiations was inadequate. There is no evidence that the property could have been sold on acceptable terms to anyone else at a higher price. There is no competent evidence that the property had a value greater than that for which it was sold.



Each case must be determined on its own facts. The facts in this case are not only unusual, they are unique. Cases such as Knight v. Nottingham Farms, Inc. and Webb and Knapp v. Hanover Bank are distinguishable on their facts.

For all of these reasons, the motions of the Counter-Defendants, Mercantile-Safe Deposit and Trust Company and The Maryland Jockey Club, to dismiss will be granted with the exception of the claim with respect to commissions against the Trustee arising out of the sale of the race track property. (T.14—63) which will be held open and decided subsequently after receipt of the requested memoranda. I think if counsel can let me have those memoranda promptly that I can dispose of that issue, and then counsel for the Counter-Defendants can prepare the appropriate decree.

## FINAL ORDER AND DECREE OF BALTIMORE CITY CIRCUIT COURT DATED MAY 23, 1974

In The Circuit Court of Baltimore City
112A/382/52662

**(Filed May 23, 1974)**

*Mercantile-Safe Deposit and Trust Company, Trustee u/w of William R. Hammond, Plaintiff,*
*v.*
*Audrey Cosden, et al., Defendants.*

*Peter H. Madden, Audrey Cosden, Michael Madden, and Christina Madden, Counter-Complainants,*
*v.*
*Mercantile-Safe Deposit and Trust Company, Trustee u/w of William R. Hammond and in its individual capacity, et al., Counter-Defendants.*

### FINAL ORDER AND DECREE

The third amended counterclaim filed herein by Peter H. Madden, Audrey Cosden, Michael Madden and Christina Madden against Mercantile-Safe Deposit and Trust Company, trustee under the will of William R. Hammond and in its individual capacity, and The Maryland Jockey Club of Baltimore City; the motion of Mercantile-Safe Deposit and Trust Company under Maryland Rule 301j to strike all of paragraph 35 thereof on the ground that the allegations thereof are impertinent, scandalous and improper; and the respective answers of Mercantile-Safe Deposit and Trust Company and The Maryland Jockey Club of Baltimore City to said third amended counterclaim coming on to be heard, evidence was



adduced by the counter-complainants and, at the conclusion of the counter-complainants' case, Mercantile-Safe Deposit and Trust Company submitted for decision by the court its said motion pursuant to Maryland Rule 301j filed with its answer to the third amended counterclaim to strike all of paragraph 35 of the third amended counterclaim on the ground that the allegations thereof were impertinent, scandalous and improper, and its motions made in open court to strike all of the opinion testimony of the witness Menges admitted subject to exception, to strike all of the opinion testimony of the witness Weinstein admitted subject to exception, to strike Mercantile Bankshares Corporation annual reports for the years 1970, 1971 and 1972 (Counter-Complainants' Exhibits 122, 123 and 124) and the Safe Deposit and Trust Company of Baltimore annual reports for the years 1945, 1946, 1947, 1948, 1949 and 1950 (proffered as exhibits but unnumbered), all admitted subject to exception, and to dismiss the third amended counterclaim on the ground that the counter-complainants had offered no evidence legally sufficient to entitle them to relief.

And at the same time The Maryland Jockey Club of Baltimore City submitted for decision by the court its motions made in open court to strike all of the opinion testimony of the witness Menges admitted subject to exception, to strike all of the opinion testimony of the witness Weinstein admitted subject to exception, and to dismiss the third amended counterclaim on the ground that the counter-complainants had offered no evidence legally sufficient to entitle them to relief.

Whereupon counsel for all parties were heard in argument, briefs were submitted on behalf of all parties and considered by the court, and the court by its opinion delivered orally from the Bench on June 27, 1973 and by its written opinion of July 11, 1973 announced its rulings granting all of said motions of the counter-defendants.

Thereafter The Maryland Jockey Club of Baltimore City filed its motion pursuant to Maryland Rule 604b for the allowance of reasonable expenses, including reasonable

attorneys' fees, incurred by it in opposing the counterclaims, and the counter-complainants filed their answer thereto but before a hearing was had on said motion and answer, the said parties, by order signed by their respective counsel, entered the said case "agreed and satisfied" as to all claims of the counter-complainants against The Maryland Jockey Club of Baltimore City and as to all claims of The Maryland Jockey Club of Baltimore City against the counter-complainants.

Thereafter Mercantile-Safe Deposit and Trust Company filed its amended motion that, in its final judgment and decree to be thereafter entered dismissing the third amended counterclaim pursuant to the aforesaid opinions of the court rendered on June 27, 1973 and July 11, 1973, the court direct that court costs be paid by the counter-complainants in such amount as shall hereafter be taxed by the clerk and that Mercantile-Safe Deposit and Trust Company be reimbursed its reasonable expenses and counsel fees incurred in opposing and defending against the allegations of paragraph 35 of the third amended counterclaim and in opposing and defending against the original and the first, second and third amended counterclaims and that such expenses and counsel fees in such amount as shall be hereafter determined and allowed by the court be paid by the counter-complainants or be charged against their distributive shares of the trust estate herein, or, in the alternative, be charged against and paid out of the whole remaining trust estate herein before the final distribution thereof to the persons entitled thereto. Answers to said amended motion were filed by the counter-complainants, which answers, among other things, asserted that in the event Mercantile-Safe Deposit and Trust Company were entitled to any reimbursement for expenses and counsel fees, the counter-complainants were entitled to a setoff or recoupment of the amount of the diminution in value of their shares of the trust estate between July 2, 1973 and the date of distribution of said trust assets or the date of the hearing on the motion, whichever was earlier. Answers to said amended motion were also filed by Anne Hallenbeck and Jayne Humphreys, discovery was had by all



parties, evidence was adduced by the counter-complainants, briefs were submitted on behalf of all parties and considered by the court, counsel for all parties were heard in argument and at the conclusion of each of the several hearings held on the matter the court by its opinions delivered orally from the Bench on October 29, 1973 and April 1, 1974, announced its rulings on the various questions presented by said amended motion and the answers thereto.

It is thereupon this 23 day of May, 1974, by the Circuit Court of Baltimore City, for the reasons set forth in the four opinions referred to above,

ADJUDGED, ORDERED and DECREED:

1. The motion of Mercantile-Safe Deposit and Trust Company to strike paragraph 35 of the third amended counterclaim under Rule 301j is granted.

2. The motion of Mercantile-Safe Deposit and Trust Company to strike the opinion testimony of the witness Menges admitted subject to exception is granted.

3. The motion of Mercantile-Safe Deposit and Trust Company to strike the opinion testimony of the witness Weinstein admitted subject to exception is granted.

4. The motion of Mercantile-Safe Deposit and Trust Company to strike the annual reports of Mercantile Bankshares Corporation for the years 1970, 1971 and 1972 and the annual reports of Safe Deposit and Trust Company of Baltimore for the calendar years 1945, 1946, 1947, 1948, 1949 and 1950 heretofore admitted as exhibits subject to exception is granted.

5. The motion of Mercantile-Safe Deposit and Trust Company to dismiss the third amended counterclaim on the ground that the counter-complainants have offered no evidence legally sufficient to entitle them to relief is granted and the said third amended counterclaim be and the same is hereby dismissed with costs to the counter-defendants in such amount as shall be hereafter taxed by the clerk.

6. The amended motion of Mercantile-Safe Deposit and Trust Company pursuant to Maryland Rule 301j that the cost, including the reasonable expenses and counsel fees, incurred by Mercantile-Safe Deposit and Trust Company in opposing and defending against the allegations of paragraph 35 of the third amended counterclaim be paid by the counter-complainants in such amount as shall be herefter determined and allowed by the court, is denied.

7. So much of the amended motion of Mercantile-Safe Deposit and Trust Company as moves that, pursuant to Maryland Rule 604b, the reasonable expenses, including counsel fees, incurred by it in opposing and defending against the original and the first, second and third amended counterclaims be paid by the counter-complainants on the ground that the counterclaims were proceedings had without substantial justification, is denied.

8. So much of the amended motion of Mercantile-Safe Deposit and Trust Company as moves that, independently of the Maryland Rules and pursuant to the general law of Maryland, the reasonable expenses, including counsel fees, incurred by Mercantile-Safe Deposit and Trust Company in opposing and defending against the original and the first, second and third amended counterclaims be charged against the distributive shares of the counter-complainants in the trust estate herein, is granted and the claim by the counter--complaiants in their answers to said motion to a setoff or recoupment against such expenses and counsel fees of the amount of the diminution in the value of their shares of the trust estate between July 2, 1973 and the date of the distribution of said trust assets or the date of the hearing on the motion, whichever was earlier, is denied and therefore the reasonable expenses, including counsel fees, incurred by Mercantile-Safe Deposit and Trust Company in opposing and defending against the original and the first, second and third amended counterclaims in such amount as shall be hereafter determined and allowed by the court shall be paid out of and charged pro



rata against the respective distributive shares only of the counter-complainants in the trust estate herein and no part thereof shall be paid out of or charged against the shares of Anne Hallenbeck or Jayne Humphreys.

9. The amount of the reasonable expenses, including counsel fees, incurred by Mercantile-Safe Deposit and Trust Company in instituting and participating in this proceeding, other than the expenses and counsel fees allowable under paragraph 8 of this decree and order, and the amount of the final compensation allowable to Mercantile-Safe Deposit and Trust Company pursuant to Section 199 of Article 16 of the Maryland Code for its services in connection with the distribution of the trust estate herein, and the manner in which and the shares of the trust estate against which such expenses and compensation shall be charged are reserved for future determination by the court; but the court does now determine and decree that such compensation as shall ultimately be allowed to Mercantile-Safe Deposit and Trust Company shall not include any compensation for any additional work or services required of it in opposing and defending against the original and the first, second and third amended counterclaims.

10. There is no just reason for delay with respect to any of the matters covered by this decree and order and this decree and order shall therefore operate as a final decree and order within the meaning of Maryland Rule 605a with respect to all the matters covered hereby which are not specifically reserved for future determination under the terms of this decree and order.

DAVID ROSS,
Judge.

## STATUTES INVOLVED—VERBATIM TEXT

### CONSTITUTIONAL PROVISIONS

The "Due Process" and "Equal Protection" clauses of the United States Constitution of 1787, as amended are as follows:

**"Amendment XIV**
Section 1.

*Citizenship Rights Not to Be Abridged by States*

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The "Separation of Powers" clause of the Constitution of Maryland of 1867, as amended, Declaration of Rights, Article 8 is as follows:

**"Article 8. Separation of Powers.**

That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other, and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other."

The "Due Process" clause of the Constitution of Maryland of 1867, as amended, Declaration of Rights, Article 23 is as follows:



**"Article 23. Due process.**

That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land."

The "Special Laws" prohibition of the Constitution of Maryland of 1867, as amended. Article III, Section 33 is as follows:

**"Section 33. Local and special laws.**

The General Assembly shall not pass local, or special laws, in any of the following enumerated cases, viz.: For extending the time for the collection of taxes; granting divorces; changing the name of any person; providing for the sale of real estate, belonging to minors, or other persons laboring under legal disabilities, by executors, administrators, guardians or trustees; giving effect to informal, or invalid deeds or wills: refunding money paid into the State Treasury, or releasing persons from their debts, or obligations to the State, unless recommended by the Governor, or officers of the Treasury Department. And the General Assembly shall pass no special Law, for any case, for which provision has been made by an existing General Law. The General Assembly, at its first Session after the adoption of this Constitution, shall pass General Laws, providing for the cases enumerated in this section, which are not already adequately provided for, and for all other cases, where a General Law can be made applicable."

### STATUTES

The federal corporate income tax laws for 1947 involved elimination of excess profits taxes and continuation of an overall corporate rate of 38%, that is:

*((59 Stat. 568-70 (1945))*
"PUBLIC LAWS—CH. 453-Nov. 8, 1945

* * *

**Part II—Corporation Taxes**

**Sec. 121. Decrease in Corporation Surtax.**

(a) IN GENERAL—Section 15 (b) (relating to the corporation surtax) is amended to read as follows:

(b) IMPOSITION OF TAX.—There shall be levied, collected, and paid for each taxable year upon the corporation surtax net income of every corporation (except a Western Hemisphere trade corporation as defined in section 109, and except a corporation subject to a tax imposed by section 231 (a), Supplement G or Supplement Q) a surtax as follows:

* * *

'(3) Surtax net incomes over $50,000.—Upon corporation surtax net incomes over $50,000, 14 per centum of the corporation surtax net income.'

* * *

(d) TAXABLE YEARS TO WHICH APPLICABLE—The amendments made by this section shall be applicable with respect to taxable years beginning after December 31, 1945. For treatment of taxable years beginning in 1945 and ending in 1946, see section 131.

**Sec. 122. Repeal of Excess Profits Tax in 1946.**

(a) IN GENERAL.—The provisions of subchapter E of chapter 2 shall not apply to any taxable year beginning after December 31, 1945.

(b) CARRY-BACKS FROM YEARS AFTER 1945, Etc.—Despite the provisions of subsection (a)



of this section the provisions of subchapter E of chapter 2 shall remain in force for the purposes of the determination of the taxes imposed by such subchapter for taxable years beginning before January 1, 1946, such determination to be made as if subsection (a) had not been enacted but with the application of the amendments made by subsection (c) of this section and section 131 of this Act.

(c) UNUSED EXCESS PROFITS CREDIT FOR TAXABLE YEAR BEGINNING AFTER DECEMBER 31, 1945.—Section 710 (c)(2) (defining the unused excess profits credit) is amended by inserting at the end thereof a new sentence reading as follows: 'There shall be no unused excess profits credit for a taxable year beginning after December 31, 1946. The unused excess profits credit for a taxable year beginning in 1946 and ending in 1947 shall be an amount which is such part of the unused excess profits credit determined under the preceding provisions of this paragraph as the number of days in such taxable year prior to January 1, 1947, is of the total number of days in such taxable year.'

* * *

(g) TECHNICAL AMENDMENTS. Effective with respect to taxable yers beginning after December 31, 1945—

(1) Section 26(e) (relating to the credit for income subject to the excess profits tax) is repealed.

(2) Section 13 (a)(2) (defining 'normal tax net income') is amended by striking out 'minus the credit for income subject to the tax imposed by Subchapter E of Chapter 2 provided in section 26 (e) and'.

(3) Section 15 (a)(defining 'corporation surtax net income') is amended (A) by striking out 'minus the credit for income subject to the tax imposed by Subchapter E of Chapter 2 provided in section 26 (e) and'; and (B) by striking out '(computed by limiting such credit to 85 per centum of the net income reduced by the credit for income subject to the tax imposed by Subchapter E of Chapter 2 in lieu of 85 per centum of the adjusted net income so reduced),'.

* * *

(h) FISCAL YEAR TAXPAYERS.—For taxable years beginning in 1945 and ending in 1946, see section 131.

**Part III—Fiscal Year Taxpayers**

**Sec. 131. Fiscal Year Taxpayers.**

(a) INCOME TAXES.—Section 108 of the Internal Revenue Code is amended by striking out '(c)' at the beginning of subsection (c) and inserting in lieu thereof '(d)', and by inserting after subsection (b) the following:

'(c) TAXABLE YEARS BEGINNING IN 1945 AND ENDING IN 1946.—In the case of a taxable year beginning in 1945 and ending in 1946, the tax imposed by sections 11, 12, 13, 14, 15, and 400 shall be an amount equal to the sum of—

'(1) that portion of a tentative tax, computed as if the law applicable to taxable years beginning on January 1, 1945, were applicable to such taxable year, which the number of days in such taxable year prior to January 1, 1946, bears to the total number of days in such taxable year, plus



'(2) that portion of a tentative tax, computed as if the law applicable to years beginning on January 1, 1946, were applicable to such taxable year, which the number of days in such taxable year after December 31, 1945, bears to the total number of days in such taxable year.

(b) EXCESS PROFITS TAX.—

(1) IN GENERAL.—Section 710 (a) (imposing the excess profits tax) is amended by inserting at the end thereof the following:

'(7) TAXABLE YEARS BEGINNING IN 1945 AND ENDING IN 1946.—In the case of a taxable year beginning in 1945 and ending in 1946, the tax shall be an amount equal to that portion of a tentative tax, computed as if the law applicable to taxable years beginning on January 1, 1945, were applicable to such taxable year, which the number of days in such taxable year prior to January 1, 1946, bears to the total number of days in such taxable year.'

(2) TECHNICAL AMENDMENTS.—

(A) Section 2 (a) of the Tax Adjustment Act of 1945 (relating to the specific exemption) is repealed as of the date of its enactment.

(B) Section 710 (b) (1) (relating to the specific exemption) is restored to read as such paragraph read immediately prior to the enactment of the Tax Adjustment Act of 1945, to be effective, as so restored, as if section 2 (a) of the Tax Adjustment Act of 1945 had not been enacted."

**(26 U.S.C.A. (1947 Supp.) §§ 13 and 15 (1939))**

**"§ 13. Tax on Corporations in General**

(a) Definitions. ****

* * * * * *

(2) Normal-tax net income. The term "normal-tax net income" means the adjusted net income minus the credit for dividends received provided in section 26 (b).

(b) Imposition of tax. There shall be levied, collected, and paid for each taxable year upon the normal-tax net income of every corporation the normal-tax net income of which is more than $25,000 (except a corporation subject to the tax imposed by section 14, section 231 (a), Supplement G, or Supplement Q) whichever of the following taxes is the lesser:

(1) General rule. A tax of 24 per centum of the normal-tax net income; or

(2) Alternative tax (corporations with normal-tax net income over $25,000, but not over $50,000). A tax of $4,250, plus 31 per centum of the amount of the normal-tax net income in excess of $25,000."

* * *

**§ 15. Surtax on Corporations**

(a) Corporation surtax net income. For the purpose of this chapter, the term "corporation surtax net income" means the net income minus the credit for dividends received provided in section 26 (b) and minus, in the case of a public utility, the credit for dividends paid on its preferred stock provided in section 26 (h). For the purposes of this subsection dividends received on the preferred stock of a public utility shall be disregarded in computing the credit for dividends received provided in section 26 (b).



(b) Imposition of tax. There shall be levied, collected, and paid for each taxable year upon the corporation surtax net income of every corporation (except a Western Hemisphere trade corporation as defined in section 109, and except a corporation subject to a tax imposed by section 231(a), Supplement G or Supplement Q) a surtax as follows:

(1) Surtax net incomes not over $25,000. Upon corporation surtax net incomes not over $25,000, 6 per centum of the amount thereof.

(2) Surtax net incomes over $25,000 but not over $50,000. Upon corporation surtax net incomes over $25,000, but not over $50,000, $1,500 plus 22 per centum of the amount of the corporation surtax net income over $25,000.

(3) Surtax net incomes over $50,000. Upon corporation surtax net incomes over $50,000, 14 per centum of the corporation surtax net income."

The regulation of the Maryland race tracks at the date of sale was as follows:

**1939 MARYLAND RACING LAW—ARTICLE 78B:**
**(Flack's Maryland Code Ann., Art. 78B (1939))**

"ARTICLE 78B.
RACING COMMISSION.

1. There shall be a Maryland Racing Commission, and the same is hereby created and established, which said Maryland Racing Commission shall be vested with and possessed of the powers and duties in this Article specified and also the powers necessary or proper to enable it to carry out fully and effectually

all the purposes of this Article. The jurisdiction, supervision, powers and duties of the Maryland Racing Commission herein created and established shall extend under this Article to any and all person or persons, associations or corporations which shall hereafter hold or conduct any meeting within the State of Maryland whereat horse racing shall be permitted for any stake, purse or reward.

* * *

4. *** The Commission shall make an annual report to the Governor on or before the first day of January, which report shall include a statement of receipts and disbursements by the Commission, and any additional information and recommendations which the Commission may deem of value.

* * *

6. No person or persons, association or corporation shall thereafter hold or conduct any meeting within the State of Maryland whereat horseracing shall be permitted or any stake, purse or reward, except such person, association or corporation shall be licensed by the Commission as hereinafter provided.

(7) (Paragraph 7 amended by Session Laws of 1946 which appears separately below)

8. (Paragraph 8 amended by Session Laws of 1946 which appears separately below)

9. Said Commission may in its discretion meet subsequent to the first day of March and award dates for racing within the limits hereinbefore provided on applications submitted to it, provided that the days so awarded in no way conflict with the further provisions of this Article; and provided, further, that no license for a race meeting shall issue prior to the payment of the fees therefor at the rate hereinbefore provided.

10. Upon the award of days to any applicant, and upon payment of the license fees as hereinbefore prescribed, the Commission shall issue a license for the holding of the meeting or meetings during the days awarded to such applicant, and for which the license fees shall have been paid, which said license shall be for all purposes in substitution for any license now



required by law and especially the license referred to in Section 124B of Chapter 285 of the Acts of 1898, and all amendments thereto, said Section being codified as Section 292 of Article 27, the Annotated Code of Maryland, title, "Crimes and Punishments," sub-title, "Gambling"; and said license shall be subject to all rights, regulations and conditions from time to time prescribed by the Commission; and such license shall be subject to suspension or revocation by the Commission for any cause whatsoever which the Commission may, in its discretion, deem sufficient. If any license is suspended or revoked, said Commission shall state publicly its reasons for so doing, and cause an entry to be made on the minute book of the Commission, and its action shall be final, provided, however, the propriety of such action shall be subject to review, upon questions of law only, by the Circuit Court of the County, within which such license was granted or by the Baltimore City Court, if such license shall have been granted in Baltimore City, the action of the Commission to stand unless and until reversed by the Court.

* * *

11. (Paragraph 11 amended by Session Laws of 1946 which appear separately below)

11A. (Paragraph 11A was added by Session Laws of 1945 which appear separately below)

12. (Paragraph 12 amended by Session Laws of 1946 which appear separately below)

13. (Paragraph 13 was amended by Session Laws of 1946 which appear separately below)

14. (Paragraph 14 amended by Session Laws of 1941 which appear separately below)

15. (Paragraph 15 amended by Session Laws of 1946 which appear separately below)

15A. (Paragraph 15A was added by Session Laws of 1946 which appear separately below)

15B. (Paragraph 15B added by Session Laws of 1946 which appear separately below)

16. Any person aiding or abetting in the conduct of any meeting within the State of Maryland at which racing of horses shall be permitted for any stake, purse or reward, except in accordance with a license duly issued and unsuspended or unrevoked by the Maryland Racing Commission, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than five hundred dollars and not more than Ten Thousand Dollars for each day of such unauthorized meeting or by imprisonment for not exceeding two years, or both fine and imprisonment, in the discretion of the Court.

It shall be the duty of all officers of the law to co-operate with the Commission for the proper enforcement of this Article, and the Governor may, upon the request of the Commission, order the Police Commissioner of Baltimore City to assign a sufficient number of patrolmen to prevent horse racing at any track, a license for which has been refused, suspended or revoked by the Commission.

17. (Paragraph 17 amended by Session Laws of 1943 which appear separately below)

18. Should any of the sections or parts of sections contained in this Article be held to be unconstitutional and void by the Court of Appeals of this State, it is hereby expressly declared that the remaining sections or parts of sections of said Article are not to be invalidated thereby, but are to remain in full force and effect as if the sections or parts of sections held unconstitutional had never been enacted.[1]

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[1]Sec. 3, ch. 273 of act of 1920, repeals all laws inconsistent with the provisions of said chapter."



## 1941 AMENDMENT TO THE 1939 MARYLAND RACING LAW, ARTICLE 78B
## (Chapter 514 of the Maryland Session Laws of 1941)

"CHAPTER 514.

(Senate Bill 327)

AN ACT to repeal Sections 14 and 15 of Article 78B of the Annotated Code of Maryland (1939 Edition), title "Racing Commission", and to enact two new Sections to said Article, to be known as Sections 14 and 15, to follow immediately after Section 13 of said Article, providing for the licensing of Agricultural Fairs, and requiring the same to pay certain fees, premiums and taxes; to repeal Sections 18, 19 and 20 of Article 2A of the Annotated Code of Maryland (1939 Edition), title "Agriculture", sub-title "Agricultural Fair Associations", and to enact a new Section 18, to follow immediately after Section 17 of said Article; prescribing the powers and duties of the State Fair Board.

Section 1. *Be it enacted by the General Assembly of Maryland*, That Sections 14 and 15 of Article 78B of the Annotated Code of Maryland (1939 Edition), title "Racing Commission", be and the same are hereby repealed, and that two new Sections, to be known as Sections 14 and 15 be added to said Article, to follow immediately after Section 13 thereof, and to read as follows:

14. In addition to licensing racing as hereinbefore provided, the Racing Commission is authorized to issue licenses to the following organizations: Agricultural and Mechanical Association of Washington County, Cumberland Fair Association Inc., Pocomoke Agricultural Fair Association, Inc., Harford County Fair Association, Inc., Southern Maryland Agricultural Fair Association of Prince George's County, and Maryland State Fair and Agricultural Society of Baltimore County. Such licenses shall permit the holders to conduct a race

meeting or meetings with betting privileges, not to exceed ten days for any one organization in any calendar year, provided such meetings are held in connection with or for the benefit of bona fide County Fairs or Agricultural Exhibitions and are held in compliance with all the provisions of this Article.

Each licensee under the provisions of this section shall pay to the County Treasurer of the County in which such fair or exhibit is held a fee of $50 for each day of said meeting, to be deposited to the credit of such county.

Each licensee under the provisions of this section shall annually provide and set aside the sum of $5,000 in premiums for bona fide live stock and agricultural exhibits. In the event that any part of said sum of $5,000 is not claimed by exhibitors, the unexpended balance shall be paid to the Racing Commission for the use of the State.

(Paragraph 15 herein amended was again amended by Session Laws of 1946 and therefore is omitted here; refer to Session Laws of 1946 which appear separately below)

* * *

Sec. 3. And be it further enacted, That this Act shall take effect from the date of its passage.

Approved May 26, 1941."

**1943 AMENDMENT TO THE 1939 MARYLAND RACING LAW, ARTICLE 78B**
**(Chapter 994 of the Maryland Session Laws of 1943)**

"CHAPTER 994.

(House Bill 642)

AN ACT to repeal and re-enact, with amendments, Sections 7 and 17 of Article 78B of the Annotated Code of



Maryland (1939 Edition), title "Racing Commission", authorizing the Maryland Racing Commission to designate the track or tracks at which racing may be conducted, under certain circumstances and conditions, and the number of days which may be assigned to any association for race meetings, and providing for the transfer of race meetings to other tracks and for the refund of license fees, under certain conditions.

Section 1. *Be it enacted by the General Assembly of Maryland*, That Sections 7 and 17 of Article 78B of the Annotated Code of Maryland (1939 Edition), title "Racing Commission", be and they are hereby repealed and re-enacted, with amendments, to read as follows:

* * *

(Paragraph 7 herein amended was again amended by Session Laws of 1946 and therefore is omitted here; refer to Session laws of 1946 which appear separately below)

17. If by reason of any cause beyond control, and through no fault nor neglect of any licensee, and while such licensee is not in default, it should become impossible, impracticable or inadvisable for such licensee to hold or conduct racing upon any date or dates licensed by the Commission, the Commission, in its discretion and at the request of such licensee shall have power to return the fees paid by such licensee for racing upon the days upon which it is impossible, impracticable or inadvisable for such licensee to hold or conduct racing and the decision of the Commission shall be final.

Sec. 2 *And be it further enacted*, That this Act is hereby declared to be an emergency law and necessary for the immediate preservation of the public health and safety, and being passed by a yea and nay vote, supported by three-fifths of all of the members elected to each of the two House (*sic*) of the General Assembly, the same shall take effect from the date of its

passage, and shall continue in effect for the duration of the present war only, after which time all racing meetings shall be held and conducted under the laws as they existed prior to the passage of this Act.

Approved May 6, 1943."

## 1945 AMENDMENT TO THE 1939 MARYLAND RACING LAW, ARTICLE 78B
## (Chapters 961 and 962 of the Maryland Session Laws of 1945)

"CHAPTER 961.

(Senate Bill 353)

AN ACT to repeal and re-enact, with amendments, Sections 11 and 13 of Article 78B of the Annotated Code of Maryland (1939 Edition and 1943 Supplement), title "Racing Commission", relating to the powers and duties of the Racing Commission, limiting the maximum tax on wagers at race meetings and providing for the payment of breakage to the said Commission, and to add a new Section to said Article, so titled, to be known as Section 11A, to follow immediately after Section 11 of said Article, providing that the Racing Commission shall require licensees to deduct certain percentages of the mutual pool as agents of the Commission, that the Commission shall hold and deposit the funds so deducted and authorize their use from time to time in the building or furnishing of substantial alterations, additions, changes, improvements or repairs to racing plants by the licensees making the deduction; providing the powers and duties of the Commission in respect to the amounts so deducted by licensees; providing that any unused part of said funds, to be known as the "Racing Fund" shall revert to the Treasurer of the State.

Section 1. *Be it enacted by the General Assembly of Maryland*, That Sections 11 and 13 of Article 78B of the



Annotated Code of Maryland (1939 Edition and 1943 Supplement), title "Racing Commission", be and they are hereby repealed and re-enacted, with amendments, to read as follows:

(Paragraphs 11 and 13 herein amended were again amended by Session Laws of 1946 and therefore are omitted here; refer to Session Laws of 1946 which appear separately below)

* * *

Sec. 2. *And be it further enacted*, That a new Section be, and it is hereby added to Article 78B of the Annotated Code of Maryland (1939 Ed.), title "Racing Commission", to follow immediately after Section 11 of said Article, and to be known as Section 11A, said new Section to read as follows:

11A. The Racing Commission shall require any licensee, as its agent, to deduct from the mutuel pool such percentage thereof as it may order from time to time, not exceeding one per centum, and to remit such deduction so made to the Commission, to be held and disposed of by it as hereinafter provided. All such deductions shall be held in and comprise a fund to be known as the "Racing Fund," and shall be deposited by the Commission in one or more banks or trust companies in the State. The members of the Commission shall have no personal liability for loss to such Fund by reason of the failure or insolvency or other fault of any depository if they shall use ordinary care in the selection of the depository. The Commission shall require any depository to secure by collateral any deposit therein comprising a part or all of the Fund.

The amount of the Racing Fund on hand at any time, representing the deductions made by any particular licensee from the mutuel pool, previously collected by such licensee, as agent of the Commission, may, with the prior written and express permission of the Commission, upon such terms and

conditions as it may prescribe, be expended by that particular licensee for any substantial alterations, additions, changes, improvements or repairs to or upon the property owned or leased by such licensee, and by it used for the conduct of racing. In determining whether to permit the use of any of the Racing Fund, the Commission shall give due consideration to whether its expenditure in each instance will promote the safety, convenience and comfort of the racing public and of horse owners and, generally, whether it will tend towards the improvement of racing in the State. If the deductions, herein provided for, made by any licensee for any calendar year, as agent of the Commission, shall neither have been spent nor binding commitments have been entered into for their expenditure, with the approval of the Commission, within three (3) years from the last day of the year of collection, the unspent portion of such year's deduction shall revert to the State as part of its general funds, and shall be paid over promptly by the Commission to the Treasurer. Provided, however, that if, due to the present war emergency, such deductions of any license for the calendar year 1944 cannot be either advantageously spent or binding commitments entered into for its expenditure prior to December 31, 1947, an additional period of two (2) years from that date is hereby granted for the expenditure or commitment of such deductions of the calendar year 1944, and similarly, if such deductions of any licensee for the calendar year 1945 can not be either advantageously spent or committed, by reason of such war emergency, by December 31, 1948, a further period of one year from said date is hereby granted for the expenditure or commitment of such 1945 deductions of any license.

Notwithstanding anything hereinabove contained to the contrary, the deductions made by the Maryland Jockey Club at the joint meetings held at Pimlico during the year 1944, for which it held a license, and the deductions made by the Maryland State Fair at the joint meeting in 1944, for which it held a license, shall be considered and treated for the purposes



of this Act, as having been made, as agents of the Commission, one-fourth by the Maryland Jockey Club, one-fourth by the Maryland State Fair, one-fourth by the Southern Maryland Agricultural Association, and one-fourth by the Harford Agricultural and Breeders Association; and the Racing Fund, as constituted as of the effective date of this Act, shall be subject to expenditure by each of said four Racing Organizations, equally, in the manner and to the extent hereinabove set forth, and, for the purposes of this Act, each shall be considered as having deducted from the mutuel pool one-fourth of said Racing Fund as so constituted as agents aforesaid. If, hereafter, the Commission shall issue a license for the conduct of racing to one of the said four Racing Organizations, for the purpose of enabling a joint meeting to be held in which one or more of the others of the above mentioned Racing Organizations participate, the deductions made by the license(*sic*) of said meeting shall be considered and treated as having been made, for the purposes of this Act, by each of said Racing Organizations participating in said meeting, as agents aforesaid, in the proportion in which it shared the profits and losses of that particular meeting, and such deductions shall be subject to expenditure from the Racing Fund by the Racing Organization considered and treated herein as having made such deduction, in the manner and to the extent hereinabove set forth.

Sec. 3. *And be it further enacted*, That this Act is hereby declared to be an emergency law and necessary for the immediate preservation of the public health and safety, and being passed upon a yea and nay vote, supported by three-fifths of all the members elected to each of the two houses of the General Assembly, the same shall take effect from the date of its passage.

Approved May 4, 1945."

"CHAPTER 962.

(Senate Bill 354)

AN ACT to ratify and confirm the action of the Maryland Racing Commission, taken on April 29, 1944, requiring a deduction of one-half of one per centum of the mutuel pool of racing licensees to be made as agent of the said Commission, and the retention by the Commission of the fund so deducted until the 1945 Session of the General Assembly of Maryland authorized the disposition under the supervision of the Commission of said fund so collected.

Section 1. *Be it enacted by the General Assembly of Maryland*, That the action of the Maryland Racing Commission taken on April 29, 1944, and evidenced by its Resolution of that date, said Resolution reading as follows:

> "*Be it resolved* that, The Commission's Resolution of April 11, 1944, as clarified on April 12, 1944, and the Commission's Resolution of July 5, 1938, authorizing a 1% additional take by the four major Racing Associations, be, and the same are hereby rescinded.
>
> "*Be it resolved* that, effective April 12th and thereafter, the four Mile Racing Associations of Maryland, be, and they are hereby authorized to take an additional ½% of the mutuel pool, provided that said additional amount is all used towards the payment of the increase in the average daily purse over and above the amount of the average daily purses paid by each of said tracks, respectively, in 1937. The allowance of this ½% additional take and its application to the payment of purse increases shall be subject to change or repeal by the Commission at any time, but shall continue in effect until further order of the Commission.



> "*Be it resolved* that, effective as of April 12, 1944, and thereafter, until the further order of the Commission, each of the four Mile Racing Associations, at any meet which they shall respectively hold, shall as agents, collect for the Maryland Racing Commission an additional ½% of the mutuel pool, and shall deposit such additional ½% daily as agents, to the order of the Maryland Racing Commission, in such depository or depositories as may, from time to time, be designated by the Commission.
>
> "*Be it further resolved* that, the ½% additional take so collected by the tracks as agents for the Commission, shall be held by the Maryland Racing Commission until the 1945 Regular Session of the General Assembly of Maryland shall authorize the disposition under the supervision of the Maryland Racing Commission, of said funds so collected."

be and the same is hereby ratified, confirmed and validated.

Sec. 2. *And be it further enacted*, That all funds which have been heretofore collected, pursuant to said Resolution of April 29, 1944, accounting from April 12, 1944, to the effective date of this Act, and which are held by the Commission, shall be added by the Commission to the Racing Fund provided for by Section 11A of Article 78B of the Code as added by the 1945 Regular Session of the General Assembly of Maryland, and shall be held and disposed of by the Commission pursuant to the provisions of said Section 11A.

Sec. 3. *And be it further enacted*, That this Act is hereby declared to be an emergency law and necessary for the immediate preservation of the public health and safety, and being passed upon a yea and nay vote, supported by three-fifths of all the members elected to each of the two houses of the General Assembly, the same shall take effect from the date of its passage.

Approved May 4, 1945."

**1946 AMENDMENT TO THE 1939 MARYLAND RACING LAW, ARTICLE 78B**
**(Chapter 3 of the Maryland Session Laws of 1946 (Spec. Sess.))**
"CHAPTER 3.

(Senate Bill 3)

AN ACT to repeal and re-enact, with amendments, Sections 7, 8, 11, 12, 13 and 15 of Article 78B of the Annotated Code of Maryland (1939 Edition and 1943 Supplement), title "Racing Commission", Sections 11 and 13 having been amended by Chapter 961 of the Acts of 1945, and to add two new sections to said Article, said new sections to be known as Sections 15A and 15B and to follow immediately after Section 15 of said Article, relating to the licensing and taxation of racing in the State and the distribution of the receipts therefrom, and repealing Chapters 89 and 264 of the Acts of 1918 and all other inconsistent laws.

Section 1. *Be it enacted by the General Assembly of Maryland*, That Sections 7, 8, 11, 12, 13 and 15 of Article 78B of the Annotated Code of Maryland (1939 Edition and 1943 Supplement), title "Racing Commission", Sections 11 and 13 having been amended by Chapter 961 of the Acts of 1945, be and they are hereby repealed and reenacted, with amendments, to read as follows:

7. Any person or persons, association or corporation, desiring to conduct racing within the State of Maryland during any calendar year, shall apply to the Maryland Racing Commission for a license so to do. Such application shall be filed with the Secretary of the Commission on or before a day to be fixed by the Commission. Such application shall specify the days on which such racing is desired to be conducted or held, and such application shall be in such form and supply such data



and information as the said Maryland Racing Commission shall prescribe. Said Racing Commission shall, as soon as practicable during nineteen hundred and forty-three (1943) and on or before the first day of March of each year thereafter, award all dates for racing in the State of Maryland within the current year, but the said dates so awarded shall not exceed One Hundred Days in the aggregate, and the decision of the Commission on the award of all such dates shall be final. In addition to the racing days authorized by other provisions of this Article, the Commission may license for a period not exceeding ten (10) days in any one year, one race meeting exclusively for trotting and pacing races for a daily license fee of Fifty Dollars ($50.00), and there shall also be paid to the Commission, not longer than five (5) days after the close of a meeting so licensed, one per centum of the whole amount wagered during said meeting, and all the money so paid shall be paid over by the Commission to the Treasurer of the State of Maryland. The Commission shall have the power to reject any application for a license for any cause which it may deem sufficient and the action of the Commission shall be final. No one person, corporation or association shall be given a license to conduct racing for more than fifty (50) days in one year, nor shall more than an aggregate of fifty (50) days racing be held in any one year on any one track within the State of Maryland. The said Racing Commission may, at any time or times, in its discretion, authorize any person, corporation or association to transfer its racing meet or meetings from its own track, or place for holding races, to the track, or place for holding races, of any other person, corporation or association now conducting racing in the State of Maryland upon payment of any and all appropriate license fees for the conduct of racing at the particular track, or place for holding races, on which the racing is to be conducted: provided, however, that no such authority to transfer shall be granted without the express consent of the person, corporation or association owning or leasing the track to which such transfer is made, but nothing in this section shall affect in

any manner the license fees, requirements, rights, conditions, terms and provisions of Section 8 of this Article; provided, further, that the Commission shall issue no license nor award any dates for racing on any tracks or places for holding races in Maryland, unless on such tracks or places for holding races, races have been run or held at least once in every year for a period of three consecutive years immediately prior to May 6, 1943. The intent and purpose of this proviso being that no new or additional tracks or places for holding races shall be licensed or awarded dates for holding or conducting races.

8. Except in the case of the trotting and pacing meeting, as provided in Section 7, and except the corporations and associations named in Section 14, each applicant desiring to hold races on the days or day awarded by the Commission shall, before the issuance of any license therefor, pay to the said Commission a license fee of One Thousand Dollars ($1,000) for each day of any meeting for the conduct of races so licensed.

11. Said Racing Commission shall have full power to prescribe rules, regulations and conditions under which all horseraces shall be conducted within the State of Maryland. Said Commission may make rules governing, restricting or regulating betting on such races and may fix, regulate and condition the rate of charge by the licensee for admission, or for the performance of any service, or for the sale of any article on the premises of such licensee, and may regulate the size of the purse, stake or reward to be offered for the conduct of such races. Each licensee may deduct and retain for its own account one-half (½) of the breakage computed to the 10¢ and 6% of the mutuel pool, including any deduction required by the Commission as its agent pursuant to the provisions of Section 11A of this Article but exclusive of the 4% State tax imposed by Section 13 of this Article. All contracts and agreements for the payment of money and all salaries, fees and compensation paid by any person or persons, association or corporation licensed as hereinbefore provided, and all proposed extensions, additions,



or improvements to the buildings, stables, improvements or tracks upon property owned or leased by such licensee shall be subject to the approval of the Commission. Said Commission shall have power to compel the production of any and all books, memoranda or documents showing the receipts and disbursements of any person, corporation or association, licensed under the provisions of this Article to conduct race meetings. The Commission may at any time require the removal of any employee or official employed by any licensee hereunder. The Commission shall also have the power to require that the books and financial or other statements of any person, corporation or association licensed under the provisions of this Article shall be kept in any manner which to the Commission may seem best, and that the Commission shall also be authorized to visit, to investigate and to place expert accountants and such other persons as it may deem necessary, in the offices, tracks or places of business of any such person, corporation or association, for the purpose of satisfying itself that the Commission's rules and regulations are strictly complied with, and the salaries and expenses of such expert accountants or other persons shall be paid by the person, corporation or association to whom they are assigned. The said Commission shall have power to summon witnesses before it and to administer oaths or affirmations to such witnesses whenever, in the judgment of the said Commission, it may be necessary for the effectual discharge of their duties; and any person failing to appear before said Commission at the time and place specified in answer to said summons, or refusing to testify, shall be deemed guilty of a misdemeanor, and, upon indictment and conviction in a Court of competent jurisdiction, shall be punishable by a fine of not more than Five Thousand Dollars ($5,000) or by sentence to jail for not more than six months, or by sentence to both fine and imprisonment, in the judgment of the Court. False swearing on the part of any witnesses shall be deemed prejury and shall be punished as such.

12. Every person or persons, association or corporation licensed to hold racing meets within the State of Maryland as hereinbefore provided, shall on or before the 20th day of December of each year return to the Commission a full statement, under oath, of their receipts from all sources whatsoever during the calendar year, and of all expenses and disbursements, all itemized in manner and form as shall be directed by the Commission, and with such allowances as may be approved by the Commission, showing the net revenue from all sources derived by such person, persons, association or corporation engaged in or conducting horse-racing.

13. In addition to the license fee and other taxes imposed by law, every person, firm, association or corporation licensed to hold racing meetings in the State of Maryland, except bona fide county fairs or agricultural exhibits, shall pay to the Maryland Racing Commission for the use of the State of Maryland, within five days after the close of each meeting, a tax at the rate of four per cent, (4%) on the total amount of money wagered on all races during each and every meeting. The payment of said tax shall be accompanied by a statement of the licensee, or his duly authorized agent, under oath, showing the amount of money wagered each day during the preceding meeting. The Commission shall promptly pay all taxes collected under the provisions of this section to the Comptroller.

In addition to the license fee, the tax on wagers and other taxes imposed by law, every person, firm, association or corporation licensed under Section 8 of this Article shall, within five days after the close of each meeting, pay to the Maryland Racing Commission for the use of the State, one-half of the breakage computed to the ten cents (10¢). The payment of said breakage shall be accompanied by a statement of the licensee, or his duly authorized agent, under oath, showing the total amount of breakage received at said meeting. The Commission



shall promptly pay the one-half of the breakage received by it under the provisions of this section to the Comptroller, as provided in Section 15A of this Article.

Every person, firm, association or corporation licensed to hold racing meetings in the State of Maryland under the provisions of Section 8 of this Article, shall in addition to the other taxes and fees imposed under the provisions of said Article, pay annually to the Maryland State Fair Board the sum of Four Thousand Dollars ($4,000.00), and to the Maryland Horse Breeders' Association the sum of Two Thousand Dollars ($2,000.00).

15. In addition to all fees, premiums, taxes or other payments required by law, each licensee under the provisions of the preceding section shall pay to the Racing Commission for the use of the State, within five days after the close of the last meeting held during the year 1947 and during each calendar year thereafter, an annual tax at the rate of 1% on the first $500,000 of money wagered on all races conducted by it during each such year, 2% on all money wagered over $500,000 and not over $1,000,000 on all such races conducted by it during each such year and 4% on all money wagered over and above the sum of $1,000,000 on all races conducted by it during each year. The payment of said tax shall be accompanied by a statement of the licensee, or his duly authorized agent, under oath, showing the amount of money wagered each day during the preceding meeting. The Commission shall promptly pay all taxes collected under the provisions of this section to the Comptroller, as provided in Section 15A of this Article. Each licensee may deduct and retain for its own account 9% of the first $500,000 of money wagered on all races conducted by it during each such year, 8% on all money wagered over $500,000 and not over $1,000,000 on all such races conducted by it during each such year and 6% on all money wagered over and above the sum of $1,000,000 on all races conducted by it during each

year, as well as breakage computed to the five cents (5¢). For the purpose of enforcing the provisions of this section the Commission shall have and exercise all of the power conferred upon it by Sections 11 and 12 of this Article.

Sec. 2. *And be it further enacted*, That two new sections be and they are hereby added to said Article 78B, said new sections to be known as Sections 15A and 15B, and to follow immediately after Section 15 of said Article, and to read as follows:

15A. All sums collected by the Racing Commission under the provisions of this Article shall be paid over to the Comptroller, and shall be distributed as follows: (1) One-half of all tax revenues received from persons, firms or associations licensed under Section 8 of this Article shall be allocated and credited to the general funds of the State and the remaining one-half shall be allocated and paid to the counties, incorporated towns and Baltimore City on the basis of population according to the latest available Federal census; (2) one-half shall be allocated and paid to the counties, associations licensed under Section 14 of this Article shall be allocated and credited to the general funds of the State, one-fourth of the said revenues shall be allocated and paid to the counties, incorporated towns and Baltimore City on the basis of population according to the latest available Federal census and one-fourth shall be allocated and credited to the Maryland State Fair Board to be used for the promotion of State and County agricultural fairs and exhibits. In determining the population of each county for the purpose of this section, the population of all incorporated towns in such county shall be excluded.

15B. The provisions of this Article are intended to be statewide and exclusive in their effect and no city, county or other political subdivision of the State shall have the authority or power to make or enforce any local law, ordinance or



regulation upon the subject of racing or to impose or collect any additional license fee or tax with respect to racing, other than the general property tax.

Sec. 3. *And be it further enacted*, That in the event the Mayor and City Council of Baltimore do not before January 1, 1947, repeal Ordinance No. 747, approved December 23, 1946, levying and imposing a 5% tax on all wagers made on races or racing in Baltimore City during the year 1947, then no part of the funds or revenues collected by the Racing Commission under the provisions of Article 78B, as amended by this Act, during the period said ordinance shall be in effect, shall be allocated or paid to the Mayor and City Council of Baltimore as provided in Section 15A of said Article 78B, as enacted by this Act, but said amounts so provided to be allocated and paid to Baltimore City shall during such period be allocated and credited to the general funds of the State.

Sec. 4. *And be it further enacted*, That all Acts or parts of Acts, general or local, and especially Chapters 89 and 264 of the Acts of 1918, imposing for the benefit of any political sub-division a license fee, tax or charge for the conduct of horse races, are hereby repealed, and that all laws, or parts of laws, inconsistent with the provisions of this Act be and they are hereby repealed to the extent of such inconsistency.

Sec. 5. *And be it further enacted*, That this Act is hereby declared to be an emergency law and necessary for the immediate preservation of the public health and safety, and having been passed by a yea and nay vote, supported by three-fifths of all of the members elected to each of the two Houses of the General Assembly, the same shall take effect from the date of its passage.

Approved December 27, 1946."

The legislative changes effected in 1947 by Senate Bill 101, as finally passed after the date of sale, were as follows:

## 1947 AMENDMENT TO THE 1939 MARYLAND RACING LAW, ARTICLE 78B

**(Chapter 502, of the Maryland Session Laws of 1947)**

"CHAPTER 502.

(Senate Bill 101)

AN ACT to repeal and re-enact, with amendments, Sections 3, 7, 8, 10, 11A and 14 of Article 78B of the Annotated Code of Maryland (1939 Ed. and 1943 Supp.), title "Racing Commission", Section 7 and 8 having been amended by Chapter 3 of the Acts of the Special Session of 1946, and Section 11A having been added by Chapter 961 of the Acts of 1945, and to repeal Section 5 of said Article and to enact in lieu thereof a new Section to follow immediately after Section 4 of said Article, relating to the employees of the Commission and the salaries of the Commission and said employees, and the appointment of stewards; and to recodify and renumber Sections 15A, 15B, 16, 17 and 18 of said Article, as Sections 17, 18, 19, 20 and 21, respectively, of said Article, and to add a new Section to said Article, to be known as Section 16 thereof, and to follow immediately after Section 15 of said Article, as now numbered, to provide for the licensing of trotting and pacing racing under certain conditions, and to repeal Section 15A of said Article as said Section was enacted by Chapter 3 of the Acts of the Special Session of the General Assembly of 1946 (said Section being renumbered Section 17 of this Act); and to enact in lieu thereof a new Section of said Article to the known as Section 17 thereof, to follow immediately after Section 16 thereof as enacted by this Act, relating to the disposition, allocation and use of revenues received from licensees licensed under the provisions of said Article.

Section 1. *Be it enacted by the General Assembly of Maryland*, That Sections 3, 7, 8, 10, 11A and 14 of Article 78B of the Annotated Code of Maryland (1939 Ed. and 1943 Supp.), title "Racing Commission", Sections 7 and 8 having been amended by Chapter 3 of the Acts of the Special Session of



1946, and Section 11A having been added by Chapter 961 of the Acts of 1945, be and they are hereby repealed and re-enacted, with amendments, to read as follows:

* * *

7. Any person or persons, association or corporation, desiring to conduct racing within the State of Maryland during any calendar year, shall apply to the Maryland Racing Commission for a license so to do. Such application shall be filed with the Secretary of the Commission on or before a day to be fixed by the Commission. Such application shall specify the days on which such racing is desired to be conducted or held, and such application shall be in such form and supply such data and information as the said Maryland Racing Commission shall prescribe. Said Racing Commission shall, as soon as practicable during nineteen hundred and forty-three (1943) and on or before the first day of March of each year thereafter, award all dates for recing in the State of Maryland within the current year, but the said dates so awarded shall not exceed One Hundred Days in the aggregate, and the decision of the Commission on the award of all such dates shall be final. The Commission shall have the power to reject any application for a license for any cause which it may deem sufficient and the action of the Commission shall be final. No one person, corporation or association shall be given a license to conduct racing for more than fifty (50) days in one year, nor shall more than an aggregate of fifty (50) days racing be held in any one year on any one track within the State of Maryland. The said Racing Commission may, at any time or times, in its discretion, authorize any person, corporation or association to transfer its racing meet or meetings from its own track, or place for holding races, to the track, or place for holding races, of any other person, corporation or association now conducting racing in the State of Maryland upon payment of any and all appropriate license fees for the conduct of racing at the particular track, or place for holding races, on which the racing is to be conducted; provided, however, that no such authority to transfer shall be granted without the express consent of the

person, corporation or association owning or leasing the track to which such transfer is made, but nothing in this section shall affect in any manner the license fees, requirements, rights, conditions, terms and provisions of Section 8 of this Article; provided, further that the Commission shall issue no license nor award any dates for racing on any tracks or places for holding races in Maryland, unless on such tracks or places for holding races, races have been run or held at least once in every year for a period of three consecutive years immediately prior to May 6, 1943, it being the intent, purpose and effect of this Section to insure that no new or additional tracks or places for holding or conducting races shall be licensed or awarded dates; provided, however, that if the Maryland Jockey Club, the Southern Maryland Agricultural Association, the Maryland State Fair or the Harford Agricultural and Breeders' Association, respectively, shall permanently abandon for racing purposes the Pimlico Track, the Bowie Track, the Laurel Track or the Havre de Grace Track, the Association so abandoning the track at which it has heretofore regularly conducted race meetings under the authority of this Article and this Section may be licensed and awarded dates for the holding or conducting of races or race meetings at a new track location in the State.

* * *

11A. For the calendar year 1947 and for each year thereafter, each licensee shall, as the agent of the Racing Commission, deduct one-half of one per centum of the total amount of money wagered on all races during each and every meeting and remit such deduction to the Commission. All such deductions shall be held in and comprise a fund to be known as the "Racing Fund," and shall be deposited by the Commission in one or more banks or trust companies in the State. The members of the Commission shall have no personal liability for loss to such Fund by reason of the failure or insolvency or other fault of any depository if they shall use ordinary care in the selection of the depository. The Commission shall require any depository to secure by collateral any deposit therein comprising a part or all of the Fund.



The amount of the Racing Fund on hand at any time, representing the deductions made by any particular licensee from the mutuel pool, previously collected by such licensee, as agent of the Commission, may, with the prior written and express permission of the Commission, upon such terms and conditions as it may prescribe, be expended by that particular licensee for any substantial alterations, additions, changes, improvements, or repairs to or upon the property owned or leased by such licensee, and by it used for the conduct of racing. In determining whether to permit the use of any of the Racing Fund, the Commission shall give due consideration to whether its expenditure in each instance will promote the safety, convenience and comfort of the racing public and of horse owners and, generally, whether it will tend towards the improvement of racing in the State. If the deductions, herein provided for, made by any licensee for any calendar year, as agent of the Commission, shall neither have been spent nor binding commitments have been entered into for their expenditure, with the approval of the Commission, within three (3) years from the last day of the year of collection, the unspent portion of such year's deduction shall revert to the State as part of its general funds, and shall be paid over promptly by the Commission to the Comptroller. Provided, however, that due to the present war emergency, such deductions of any licensee for the calendar years 1944, 1945 and 1946 may be expended or binding commitments entered into for its expenditure at any time prior to December 31, 1950.

Notwithstanding anything contained in this Section to the contrary, the deductions made by the Maryland Jockey Club at the joint meetings held at Pimlico during the year 1944, for which it held a license, and the deductions made by the Maryland State Fair at the joint meeting in 1944, for which it held a license, shall be considered and treated for the purposes of this Section, as having been made, as agents of the Commission, one-fourth by the Maryland Jockey Club, one-fourth by the Maryland State Fair, one-fourth by the Southern

Maryland Agricultural Association, and one-fourth by the Harford Agricultural and Breeders Association; and the Racing Fund, as constituted on May 4th, 1945, shall be subject to expenditure by each of said four Racing Organizations, equally, in the manner and to the extent hereinabove set forth, and, for the purposes of this Section, each shall be considered as having deducted from the mutuel pool one-fourth of said Racing Fund as so constituted as agents aforesaid. If, hereafter, the Commission shall issue a license for the conduct of racing to one of the said four Racing Organizations, for the purpose of enabling a joint meeting to be held in which one or more of the others of the above-mentioned Racing Organizations participate, the deductions made by the licensee of said meeting shall be considered and treated as having been made, for the purposes of this Section, by each of said Racing Organizations participating in said meeting, as agents aforesaid, in the proportion in which it shareed the profits and losses of that particular meeting, and such deductions shall be subject to expenditure from the Racing Fund by the Racing Organization considered and treated herein as having made such deduction, in the manner and to the extent hereinabove set forth.

14. In addition to licensing racing, as hereinbefore provided, the Racing Commission is authorized to issue licenses to the following organizations: Agricultural and Mechanical Association of Washington County, Cumberland Fair Association, Inc., Pocomoke Agricultural Fair Association, Inc., Harford County Fair Association, Inc., Southern Maryland Agricultural Fair Association of Prince George's County, and the Maryland State Fair and Agricultural Society of Baltimroe County. Such licenses shall permit the holders to conduct a race meeting or meetings with betting privileges, not to exceed ten days for any one organization in any calendar year, provided such meetings are held in connection with or for the benefit of bona fide County Fairs or Agricultural Exhibitions and are held in compliance with all the provisions of this Article.



If any organization entitled, under this Section, to a license and the award of dates for racing shall permanently abandon for racing purposes its present track, it may, with the approval of the Commission, be awarded a license and dates for racing at a new track within the same County in which it has theretofore conducted racing, provided, however, that no license shall be issued under the provisions of this Section to permit racing at the same track for which a license may be issued under the provisions of Section 7 of this Article.

Each licensee under the provisions of this section shall pay to the County Treasurer of the County in which such fair or exhibit is held a fee of $50 for each day of said meeting, to be deposited to the credit of such county.

* * *

Sec. 3. *And be it further enacted*, That Sections 15A and 15B of Article 78B of the Annotated Code of Maryland, title "Racing Commission", as enacted by Chapter 3 of the Acts of the Special Session of the General Assembly of 1946, be and they are hereby recodified, transferred and renumbered as Sections 17 and 18 of said Article, respectively, to follow immediately after Section 16 of said Article, as enacted by this Act, and that Sections 16, 17, and 18 of said Article, as now constituted, shall be recodified, transferred and renumbered as Sections 19, 20 and 21 of said Article, respectively, to follow immediately after Section 18 as herein recodified, transferred and numbered.

Any reference in this Article to the number of any Section as it has heretofore existed shall be deemed, taken and construed as a reference to the same Section as recodified, transferred and renumbered by this Act.

The recodification, transfer and renumbering of the several Sections in Article 78B, as provided by this Act, shall not change, impair or affect the existence, tenor, validity and application of said Sections or any of them or of any other Section except as specifically herein provided.

Sec. 4. *And be it further enacted*, That a new Section be, and it is hereby added to Article 78B of the Annotated Code of Maryland (1939 Ed.), title "Racing Commission", to follow immediately after Section 15, as enacted by Chapter 3 of the Acts of the Special Session of the General Assembly of 1946, to be known as Section 16, said new Section to read as follows:

16. In addition to the licensing of racing as hereinbefore provided, the Commission is authorized in its discretion to issue licenses for the holding of trotting and pacing meetings at which there may be offered stakes, purses or awards, and the Commission shall have supervisory powers over such meetings and those licensed in the same manner and to the same extent, where not inappropriate, as it has by virtue of the provisions of this Article over those licensed under the provisions of Sections 7 and 14 of this Article, provided, however, that under this section not more than one license with parimutuel betting privilege shall be issued in any County or in Baltimore City and that no such license shall be issued hereafter in Carroll, Dorchester, Frederick, Montgomery or Wicomico Counties.

Each licensee licensed under the provisions of this Section shall at its option be permitted to avail itself of the pari-mutuel betting privileges heretofore granted in this Article, retaining for its own use 6% of the money wagered together with breakage computed to ten cents (10¢), and shall pay to the Racing Commission for the use of the State within five days after the close of the meeting held during the year 1947, and each calendar year thereafter, an annual tax at the rate of four percent (4%) on money wagered on all races conducted by it during the year, together with a license fee of Twenty-five Dollars ($25.00) for each day that races are held, provided that the Racing Commission shall not authorize more than one hundred days of racing with betting privileges in any one year, and not more than twenty days at any one track.

For the purpose of enforcing the provisions of this Section



the Commission shall have and exercise all of the powers conferred upon it by Sections 11 and 12 of this Act.

Sec. 5. *And be it further enacted*, That Section 15A of Article 78B of the Annotated Code of Maryland, title "Racing Commission", as enacted by Chapter 3 of the Acts of the Special Session of the General Assembly of 1946 (being Section 17 as renumbered by Section 2 of this Act) be and the same is hereby repealed, and that a new Section be and it is hereby enacted in lieu thereof, said new Section to be known as Section 17, to follow immediately after Section 16, as enacted by this Act, and to read as follows:

17. All sums collected by the Racing Commission, under the provisions of this Article, shall be paid over to the Comptroller, and shall be disbursed and distributed as follows:

(1) There are to be allocated and credited to the general funds of the State: (a) One-half of all revenues collected from licensees licensed under Section 7 of this Article; (b) One-half of all revenues collected from licensees licensed under Section 14 of this Article; (c) One-half of all revenues collected from licensees licensed under Section 16 of this Article;

(2) There shall be divided among and allocated and paid to the several counties of the State and to Baltimore City on the basis of population, according to the latest available Federal census: (a) One-half of all revenues collected from licensees licensed under Section 7 of this Article: (b) One-Quarter of all revenues collected from licensees licensed under Section 14 of this Article; (c) One-half of all revenues collected from licensees licensed under Section 16 of this Article;

(3) One-quarter of all revenues collected from licensees licensed under Section 14 of this Article shall be allocated and paid to the Maryland State Fair Board, and used for the promotion of State and County Agricultural Fairs and Exhibits.

(4) All revenues not hereinabove specifically allocated shall be credited to the general funds of the State.

From the funds allocated to each County under the provisions of this Section, the County Commissioners of the County shall allocate and pay to each incorporated town in the County a share of such funds in the ratio which the population of each such town (figured on the best and most reliable figures available in the opinion of the County Commissioners) bears to the total population of the County, provided, however, that such distribution shall be made if and only if the two following conditions are met: (a) only if such funds are used for the construction or maintenance of streets, or sewerage facilities or water systems, or garbage collections and disposal within the town; and (b) only if such town shall raise by taxation and apply for the same purpose as is the distributed funds an amount equal to any funds so distributed. The share which any incorporated town failing to comply with the provisions of this Section would have received upon such compliance shall be retained by the County.

All funds allocated and paid to any County of the State under the provisions of this Section, which shall not be distributed to incorporated towns in the County as hereinabove provided, shall be used by the County only for the construction and maintenance of capital assets, including roads, schools, water systems, electric light and power systems, gas systems, bridges and grade-crossing eliminations.

Sec. 6. *And be it further enacted*, That this Act shall take effect June 1, 1947.

Approved April 16, 1947."

The Maryland corporate income tax law for 1946–47 was as follows:

**(Flack's 1947 Cumulative-Supplement-Annotated Code of Maryland, Art. 81, §§ 224 and 230 (b) (1947))**



"224. (Deductions.) The following deductions shall be allowed, but in the case of a corporation or a non-resident only to the extent that they are properly allocable to income taxable under this sub-title:

(a) All ordinary and necessary expenses except to the extent limited by Section 225 hereof paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensations for personal services actually rendered in producing taxable income.

* * *

230. (Imposition of Tax.)

* * *

(b) There is hereby levied and imposed for the taxable year 1947 a tax on the net income of every corporation (domestic or foreign) at the rate of one and one-half per cent (1½%) of such portion thereof as is allocable to this State under the provisions of Section 253 hereof."

The Maryland law pertaining to allocation of receipts and charges between trust income and trust principal is as follows:

**(Maryland Code Ann., *Estates and Trusts* §§ 14-204(d)(1) and (2), 14-210(a)(1), (2) and (5), 14-212, 14-213 and 14-214 (1974))**

"*Subtitle 2. Principal and Income.*

* * *

**§ 14-204. When income beneficiary entitled to income; allocation of income receipts; termination of income interest.**

* * *

(d) On termination of an income interest, the income beneficiary whose interests is terminated, or his estate, is entitled to:

(1) Income undistributed on the date of termination;

(2) Income due but not paid to the trustee on the date of termination;

* * *

**§14-210. Charges Against Income and Principal; Charges of Unusual Amount Against Income; Regularly Recurring Charges Payable from Income.**

(a) The following charges shall be made against income:

(1) Ordinary expenses incurred in connection with the administration, management, or preservation of the trust property, including regularly recurring taxes assessed against any portion of the principal, water rates, premiums on insurance taken upon the interests of the income beneficiary, remainderman, or trustee, interest paid by the trustee, ground rents, and ordinary repairs;

(2) A reasonable allowance for depreciation on property subject to depreciation under generally accepted accounting principles, but no allowance shall be made for depreciation of that portion of any property used by a beneficiary as a residence or for depreciation of any property, as then constituted, held by the trustee on July 1, 1965 for which the trustee is not then making an allowance for depreciation;

* * *



(5) Compensation of the trustee on income as provided by § 14-103(b) of this title and all expenses reasonably incurred for current management of principal and application of income;

* * *

(An. Code 1957, art. 75B, § 11; 1974, ch. 11, § 2.)

* * *

**§ 14-212. Application of Subtitle.**

Except as otherwise specifically provided in this subtitle or in the trust instrument, will or other controlling document, this subtitle shall apply to any receipt or expense received or incurred on or after July 1, 1965 by any trust or decedent's estate or in connection with any legal life estate, whether established on, before or after the effective date of this subtitle and whether the asset involved was acquired by the trustee, personal representative or life tenant on, before or after the effective date of this subtitle. (An. Code 1957, art. 75B, § 13; 1974, ch. 11, § 2.)

**§ 14-213. Uniformity of Interpretation.**

Such of the provisions of this subtitle as are uniform with statutes enacted in other states shall be so construed as to effectuate their purpose to make uniform the laws of those states which enact such provisions. (An. Code 1957, art. 75B, §14; 1974, ch. 11, § 2.)

**§ 14-214. Short Title.**

This subtitle may be cited as the Maryland Revised Uniform Principal and Income Act. (An. Code 1957, art. 75B, § 15; 1974, ch. 11,§ 2.)"

The following 20-year statutes of limitations pertained to actions for recovery of adversely possessed real estate in Maryland in 1947, that is:

**(English Statues at Large, 21 James 1, Ch. XVI)**

"CAP. XVI.

An Act for Limitation of Actions, and for avoiding of Suits in Law.

For quieting of Mens Eftates, and avoiding of Suits, be it enacted by the King's moft excellent Majefty, the Lords Spiritual and Temporal, and Commons, in this prefent Parliament affembled. That all Writs of *Formedon in Defcender, Formedon in Remainder*, and *Formedon in Reverter*, at any Time hereafter to be fued or brought, of or for any Manors, Lands, Tenements or Hereditaments, whereupon any Perfon or Perfons now hath or have any Title, or Caufe to have or purfue any fuch Writ, fhall be fined and taken within twenty Years next after the End of this prefent Seffion of Parliament: And after the faid twenty Years expired, no fuch Perfon or Perfons, or any of their Heirs, fhall have or maintain any fuch Writ, of or for any of the faid Manors, Lands, Tenements or Hereditaments; (2) and that all Writs of *Formedon in Defcender, Formedon in Remainder*, and *Formedon in Reverter*, of any Manors, Lands, Tenements, or other Hereditaments whatfoever, at any Time hereafter to be fued or brought by Occafion or Means of any Title or Caufe hereafter happening, fhall be fued and taken within twenty Years next after the Title and Caufe of Action firft defended or fallen, and at no Time after the faid twenty Years; (3) and that no Perfon or Perfons that now hath any Right or Title of Entry into any Manors, Lands, Tenements or Hereditaments now held from him or them, fhall thereinto enter, but within twenty Years next after the End of this prefent Seffion of Parliament, or within twenty Years next after any other Title of Entry accrued; (4) and that no Perfon or Perfons fhall at any Time hereafter make any Entry into any Lands,



Tenements or Hereditaments, but within twenty Years next after his or their Right or Title which fhall hereafter first defcend or accrue to the fame; and in default thereof, fuch Perfons fo not entering, and their Heirs, fhall be utterly excluded and difabled from fuch Entry after to be made; any former Law or Statute to the contrary notwithftanding. ***"

**(5 Maryland Code Ann., Art. 57, § 10 (1957))**

**"§ 10. Limitation in Bar of Patents by State.**

Whenever land shall be taken up under a common or special warrant, or warrant of resurvey, escheat or proclamation warrant, any person, body politic or corporate may give in evidence under the general issue his possession thereof; and if it shall appear in evidence that the person, body politic or corporate, or those under whom they claim have held the lands in possession for twenty years before the action brought, such possession shall be a bar to all right or claim derived from the State under any patent issued upon such warrant; but nothing herein contained shall apply to any warrant laid before the 26th day of January, 1819. (An. Code, 1951, § 10; 1939, § 10; 1924, § 10; 1912, § 10; 1904, § 10; 1888, § 9; 1818, ch. 90; 1849, ch. 424.)"

The Maryland statute which suspends the running of the statute of limitations until actual or imputed discovery of fraud is as follows:

**(Maryland Code Ann., *Courts and Judicial Proceedings* §5-203 (1973))**

**"§5-203. Ignorance of cause of action induced by fraud.**

If a party is kept in ignorance of a cause of action by the fraud of an adverse party, the cause of action shall be deemed to accrue at the time when the party

discovered, or by the exercise of ordinary diligence should have discovered the fraud. (An. Code 1957, art. 57, §14; 1973, 1st Sp. Sess., ch. 2,§1.)"

The Maryland anti-gambling statute which dated back to 1890 and was in force in 1947 was as follows:

**(3A Maryland Code Ann., Art. 27, § 240 (1957))**

**§240. Betting, wagering or gambling; pools on horses, etc.**

It shall not be lawful for any person or persons, or association of persons, or for any corporation within the State of Maryland, to bet, wage [wager] or gamble in any manner, or by any means, or to make or sell a book or pool on the result of any trotting, pacing or running race of horses or other beasts, or race, contest or contingency of any kind, or to establish, keep, rent, use or occupy or knowingly suffer to be used, kept or rented or occupied, any house, building, vessel, grounds or place, or portion of any house, building, vessel, grounds or place, on land or water, within the State of Maryland, for the purpose of betting, wagering or gambling in any manner, or by any means, or making, selling or buying books or pools therein or thereon upon the result of any race or contest or contingency, or by any means or devices whatsoever, to receive, become the depository of, record or register, or forward or purpose, or agree or pretend to forward any money, bet, wager, thing or consideration of value, to be bet, gambled or wagered in any manner, or by any means or device whatsoever, upon the result of any race, contest or contingency, and any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be subject to a fine of not less than two hundred dollars nor more than one thousand dollars, one half



of said fine to go to the informer, and shall be subject to imprisonment in jail for not less than six months nor more than one year, or be both fined and imprisoned, in the discretion of the court. (An. Code, 1951, §306; 1939, §291; 1924, §247; 1912, §217; 1904, §202; 1890, ch. 206; 1894, ch. 232; 1898, ch. 285, §124A.)

**Cross references.—** As to State Racing Commission and horse racing generally, see article 78B. As to lotteries generally, see §356 et seq. of this article.

The Maryland "insurable interest" statute regulating the permissible dollar-coverage limits on property insurance is as follows:

**(5A Maryland Code Ann., Art. 48A, § 367(a), (b) and (e) (1963))**

**"§367. Same—Property insurance.**

(a) *Required.*— No contract of insurance of property or of any interest in property or arising from property shall be enforceable as to the insurance except for the benefit of persons having an insurable interest in the things insured as at the time of the loss.

(b) *Definition.*—"Insurable interest" as used in this section means any actual, lawful, and substantial economic interest in the safety or preservation of the subject of the insurance free from loss, destruction, or pecuniary damage or impairment.

* * *

(e) *Measure of interest.*— The measure of an insurable interest in property is the extent to which the insured might be damnified by loss, injury, or impairment thereof. (1963, ch. 553, §1; 1969, ch. 4, §3.)"

The 1969 version of the Maryland renounced legacy statute was as follows:

**(8A Maryland Code Ann., Art. 93, §§ 4-404, 12-101 and 12-102(c) (1957))**

**"§4-404. Void, inoperative and renounced legacies.**

Unless a contrary intent is expressly indicated in the will, any property failing to pass under a void or otherwise inoperative legacy, and which is not provided for in §4-403, and any property which is the subject of a renounced legacy, shall be distributed as part of the estate of the testator to those persons, including legatees, who would have taken said property if the void, inoperative or renounced legacy had not existed. Where a legacy to one of two or more residuary legatees is void, inoperative or renounced the other residuary legacies shall be proportionately augmented by the assets which are the subject of such legacy. (1969, ch. 3, §1.)

* * *

**§ 12-101. Effective date.**

The effective date of this article [§4-404] shall be 12:01 a.m. on January 1, 1970. (1969, ch. 3, §1.)

**§12-102. Applicability.**

Unless otherwise specifically provided in another section of another subtitle of this article, the provisions of this article shall apply as follows:

* * *

(c) Subtitle IV [§4-404] shall apply to all wills executed on or after the effective date of this article, except that §4-105 shall apply to any act or acts of revocation occurring on or after January 1, 1970. * * * (1969, ch. 3, §1.)"

The 1974 version of the Maryland renounced legacy staute is as follows:

**(Maryland Code Ann., *Estates and Trusts* §§ 4-404, 12-101 and 12-103(a) and (d)(1974))**



**"§ 4-404. Void or inoperative legacies.**

(a) *Nonresiduary legatee.*— Unless a contrary intent is expressly indicated in the will, property failing to pass under a void or inoperative legacy, and which is not provided for in §4-403, shall be distributed as part of the estate of the testator to those persons, including legatees, who would have taken the property if the void or inoperative legacy had not existed.

(b) *Residuary legatee.*—Where a legacy to one of two or more residuary legatees is void or inoperative, the other residuary legacies shall be augmented proportionately by the property which is the subject of the legacy. (An. Code 1957, art. 93, §4-404; 1974, ch. 11, §2.)

* * *

**§ 12-101. Effective Date.**

The estates of decendents law takes effect at 12:01 a.m. on July 1, 1974, (An. Code 1957, art. 93, §12-101; 1974, ch. 11, §2.)

**§ 12-102. Applicability.**

(a) Unless otherwise specifically provided in another section of the estates of decedents law, the provisions of the estates of decedents law apply as provided in this section.

* * *

(d) Title 4 [§4-404] applies to any will excuted on or after 12:01 a.m. on January 1, 1970, *** (An. Code 1957, art. 93, §§4-111, 4-112, 12-102; 1974, ch. 11, §2.)"

The Maryland intestacy laws of 1909 were as follows:

**(Bagby's Code of 1911, Art. 46 and Art. 93)**

*"Article 46*

1. If any person seized of an estate in lands, tenements, or hereditaments, lying in this State, in fee simple. . . shall die intestate thereof, such lands, tenements or hereditaments shall descend in fee simple to the kindred, male and female, of such person, in the following order, to wit:

2. To the child or children and their descendents, if any, equally.

* * *

25. No right in the inheritance shall accrue to or vest in any person other than to children of the intestate, and their descendents, unless such person is in being, and capable in law to take as heir at the time of the intestate's death; but any child or descendent of the intestate, born after the death of the intestate, shall have the same right of inheritance as if born before the death of the intestate.

* * *

27. If in the descending or collateral line, any father or mother shall be dead, the child or children of such father or mother shall by representation be considered in the same degree as the father or mother would have been if living, and shall have the same share of the estate as the father or mother, if living, would have been entitled to, and no more; and in such case, when there are more than one, the share aforesaid shall be equally divided among such children; provided, that there be no representation admitted among collaterals after brothers' and sisters' children. ***

*Article 93*

119. When all debts of an intestate exhibited and proved or notified and not barred shall have



been discharged or settled, or allowed to be retained as herein directed, the administrator shall proceed to make distribution of the surplus as follows:

* * *

123. The surplus, exclusive of the share of the surviving husband or widow, as the case may be, or the whole surplus (if there be no surviving husband or widow), shall go as follows:

124. If there be children and no other descendants, the surplus shall be divided equally amongst them.

125. If there be a child or children, and a child or children of a deceased child, the child or children of such deceased child shall take such share as his, her or their deceased parent would (if alive) be entitled to; and every other descendant or other descendants in existence at the death of the intestate shall stand in the place of his or their deceased ancestor. . .; and in all cases those in equal degree claiming in the place of an ancestor shall take equal shares. ***"

The following are excerpts from the 1947 racing laws of the State of Michigan relating to the rental of $250,000 annually paid to the State by the operator for the use of the race track owned by the State in Detroit known as the "Detroit Fair Grounds", which rental was in addition to the general racing fees and take paid by all Michigan race tracks to the State, that is:

**(Michigan Sess. Laws of 1947, No. 107, §§ 9 and 16)**

"[18.949] License to operate track, application revocation; review by circuit court; city area defined; leasing of lands by department of agriculture; license to conduct racing meet; application, bond.

SEC. 9. Any person desiring to maintain or operate a track for horse racing with wagering by

pari-mutuel or auction pool methods on the results of such races, whether or not such track is then constructed, shall show satisfactory financial responsibility and shall apply to the commissioner for a license for such track; such application shall be in writing, shall show the location of the track or of the proposed track as the case may be, and shall be accompanied by substantially detailed plans and specifications of the track, buildings, fences and other improvements; and the commissioner, if such track does not comply with the regulations, shall refuse any such license but shall grant a license upon compliance with requirements imposed by him; and after any such license is issued, it may be revoked if the licensee after reasonable notice from the commissioner does not make such improvements or additions to the track as the commissioner may reasonably require, or if the licensee wilfullly violates the provisions of this act. The action of the commissioner in refusing such a track license shall be subject to review by the circuit court of the country in which such track is located. In both of the above cases, either party may appeal from the circuit court to the supreme court. The applicant for such license shall also pay the license fees hereinafter provided. Not more than 1 such license shall be granted in any county, except in any 'city area.' A city area is hereby defined to include any city having a population of 250,000 or more, according to the last federal decennial census or any subsequent decennial census, and the counties wholly or partly within a distance of 30 miles of the city limits of each city. In such city area there may be licensed not more than 2 tracks one of which shall be the Michigan state fair track, if the management thereof so desires and fulfills the requirements of the regulations herein provided.



The state department of agriculture is hereby authorized to lease on a yearly basis on behalf of the state for the conduct of horse racing and other lawful purposes, such portion of lands subject to the control of the said department of agriculture, said lease to return a rental of not less than $250,000.00 annually, to be paid into the general fund of the state of Michigan upon execution of the lease, said lease to be subject to the approval of the state administrative board: *Provided.* That a lease shall not be executed unless the lessee has paid all moneys theretofore due to the state of Michigan under any lease, agreement, understanding or consent.

The application shall give the name and address of the applicant, and if a corporation, shall state the place of its incorporation, and shall give such other information required by the regulations or by the commissioner. Upon the filing of such application and payment of such licensee fee, the commissioner shall make such investigation of the applicant and of the track or proposed track as he deems best, and if satisfied such person and such track meet all regulations, he shall grant a license for such track, designating therein the county or area of the licensee. No person shall be licensed to operate more than 1 racing track. Such license for such track shall continue so long as the annual licensee fee is paid, or until such license is voluntarily surrendered, or terminated as hereinabove provided.

Any person or persons desiring to conduct a racing meet within the state of Michigan, shall apply to the commissioner for a license to do so. Such application shall be filed with the secretary of the commission at least 10 days prior to the first day of each horseracing meeting, which such person or

persons propose to hold or conduct. Such application shall specify the day or days on which such racing is desired to be conducted or held, and such application shall be in such form and supply such data and information as the commissioner shall prescribe. The commissioner shall have the power to reject any application for a racing meet license for any cause which he may deem sufficient, which rejection may be appealed to the circuit and supreme court. The commissioner shall before executing any license, require that the licensee shall execute and deliver to him a bond payable to the State of Michigan in such sum as he shall determine, not however, in excess of $50,000, with surety or sureties to be approved by him, conditioned upon payment of all sums due and payable or collected by said licensee under this act. The commissioner shall issue no license or award any dates for racing on any tracks for holding races in Michigan, unless such tracks have been licensed for horseracing as herein provided.

* * *

[18.956] Fees payable to state; return.

Sec. 16. Each licensee under this act shall pay

(a) Annually to the state treasurer at such time and manner as may be prescribed by the regulations, the following fees, except for fairs as herein provided:

1. For any licensed track in any city area of 100,000 people or more as above herein described, $500.00 annually.

2. For any other licensed track $100.00 annually.

(b) A racing tax for each day's racing, both harness and running, shall be paid in accordance with the following schedule and in such manner and time as the commissioner shall require:

(1) Running races.



(a) Each licensee for running races in the city area from his commission will pay to the state treasurer 5 per cent of all moneys wagered in pari mutuel or auction pool wagering at every meet for running races. Plus ½ the breaks.

(b) Each licensee for running races outside the city area from his commission will pay to the state treasurer 2 per cent of all moneys wagered in pari mutuel or auction pool wagering at every meet for running races. Plus ½ the breaks.

(2) Harness races.

Each licensee for harness racing from his commission will pay to the state treasure 2 per cent of all moneys wagered in pari-mutuel or auction pool wagering at every meet for harness races. Plus ½ the breaks.

Bona fide hunt clubs licensed by any recognized steeplechase or hunt association shall pay a daily license tax fixed in the discretion of the commissioner.

If by reason of any cause beyond control, and through no fault nor neglect of any licensee, and while such licensee is not in default, it should become impossible for such licensee to hold or conduct racing upon any date or dates licensed by the commissioner, the commissioner, in his discretion and at the request of such licensee shall have power to return the fees paid by such licensee for racing upon the days upon which it is impossible for such licensee to hold or conduct racing.

This act is ordered to take immediate effect.

Approved May 21, 1947."

## ORDINANCES

In addition to the State of Maryland's pre-emption of the legislative field in connection with the annual licensing of the

Pimlico location for purposes of conducting a race track, the Baltimore City Council also authorized that use of the location under the "non-conforming" use provision of the zoning code, that is:

**(Baltimore City Council, Ordinance No. 1247, pp. 416, 429-30 (1930-31))**

"ORDINANCE No. 1247.

An ordinance to adopt a comprehensive plan designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid the undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements; and, in accordance with such plan, to divide the City of Baltimore into use height and area districts, and to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes; and to provide for the administration and enforcement of said regulations and restrictions; to impose certain duties and confer powers upon the Buildings Engineer and the Board of Zoning Appeals, which Board is created by the provisions of this ordinance; to provide for appeals; to provide penalties for the violation of the provisions of this ordinance, and to repeal certain ordinances; and to provide for amendments to this ordinance.

* * *

Par. 11. *Non-conforming Uses.* A non-conforming use is a use that now exists and that does not



comply with the regulations for the use district in which it is established. A non-conforming use may not be extended, except as hereinafter provided, but the extension of a use to any portion of a building, which portion is now arranged or designed for such non-conforming use, shall not be deemed to be an extension of a non-conforming use. A non-conforming use may be changed to a use of the same classification or to a use of a higher classification. A non-conforming use, if changed to a use of a higher classification, may not thereafter be changed to a use of a lower classification. If a use, for which an ordinance is required under the provisions of paragraph 4, is changed to a use for which no ordinance is required under those provisions, it may not thereafter be changed to a use for which an ordinance is required without such an ordinance. Nothing contained in this ordinance shall be construed to prevent the continuance of any use which now legally exists."

* * *

As for the 25 acres across the street from the Pimlico Race Track, that is, lying East of Old Pimlico Road, it was not until 1958 that authorization was obtained from the Baltimore City Council to use that area for a parking lot, that is:

**(Baltimore City Council, Ordinance No. 1576, pp. 188-89 (1958))**

"ORDINANCES

No. 1576

(Council No. 2040)

An ordinance granting permission for the establishment, maintenance and operation of an open area for the parking of motor vehicles on the property on the east side of Pimlico Road, south from Rogers

Avenue, and the property on the south side of Rogers Avenue, east from Pimlico Road, and the property on the north side of Belvedere Avenue, east of Pimlico Road, as outlined in red on the four plats accompanying this ordinance, under the provisions of Section 17 of Article 40 of the Baltimore City Code (1950 Edition), title "Zoning", as said Article was revised by Ordinance No. 711, approved May 21, 1953.

Whereas, provision has been made for the establishment, maintenance and operation of open areas in residential use districts for the parking of motor vehicles for the benefit of the health, safety and general welfare of the community; now, therefore

Section 1. *Be it ordained by the Mayor and City Council of Baltimore*, That permission be and the same is hereby granted for the establishment, maintenance and operation of an open area for the parking of motor vehicles on the property on the east side of Pimlico Road, south from Rogers Avenue, and the property on the south side of Rogers Avenue, east from Pimlico Road, and the property on the north side of Belvedere Avenue, east of Pimlico Road, as outlined in red on the four plats accompanying this ordinance, under the provisions of Section 17 of Article 40 of the Baltimore City Code (1950 Edition), title "Zoning", as said Article was revised by Ordinance No. 711, approved May 21, 1953.

Sec. 2. *And be it further ordained*, That all entrances and exits on said parking area shall be at such location or locations as shall be approved by the Commissioner of Transit-Traffic.

Sec. 3. *And be it further ordained*, That when the Maryland Jockey Club shall no longer conduct



racing at said track or when said track shall no longer be used for the purposes of racing the permission granted herein shall become null and avoid and said area shall be used for residential purposes only.

Sec. 4. *And be it further ordained*, That this ordinance shall take effect from the date of its passage.

Approved July 9, 1958

THOMAS D'ALESANDRO, JR., Mayor."

## RULES AND REGULATIONS

The following Rules of the Securities and Exchange Commission pertained in the period of 1947 to the trading in race track securities on the Boston Exchange and the over-the-counter market and precluded insider knowledge in connection with purchases and sales in those markets, that is:

**(15 C.F.R. Part 240, §§240.10b—3,240.10b—5, and 240.15cl—2)**

"EMPLOYMENT OF MANIPULATIVE AND DECEPTIVE DEVICES BY BROKERS OR DEALERS

Rule X-20B-3

It shall be unlawful for any broker or dealer, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, to use or employ, in connection with the purchase or sale of any security otherwise than on a national securities exchange, any act, practice, or course of business defined by the Commission to be included within the term "manipulative, deceptive or other fraudulent device or contrivance," as such term is used in Section 15(c) of the Act.

*(Adopted in Release No. 1330, issued August 4, 1937, and effective October 1, 1937. Designation changed by Release No. 1887, issued October 1, 1938, and effective September 10, 1938.)*

## EMPLOYMENT OF MANIPULATIVE AND DECEPTIVE DEVICES

### Rule X-10B-5

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

*(Adopted in Release No. 3230, effective May 21, 1942)*

## FRAUD AND MISREPRESENTATION

### Rule X-15C1-2

(a) The term "manipulative, deceptive, or other fraudulent device or contrivance," as used in Section 15(c)(1) of the Act, is hereby defined to include any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.



(b) The term "manipulative, deceptive, or other fraudulent device or contrivance," as used in Section 15(c)(1) of the Act, is hereby defined to include any untrue statement of a material fact and any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, which statement or omission is made with knowledge or reasonable grounds to believe that it is untrue or misleading.

(c) The scope of this rule shall not be limited by any specific definitions of the term "manipulative, deceptive, or other fraudulent device or contrivance" contained in other rules adopted pursuant to Section 15(c)(1) of the Act.

*(Adopted as Rule MC2 in Release No. 1330, issued August 4, 1937, and effective October 1, 1937, and amended and redesignated Rule X-15C1-2 in Release No. 1763, issued and effective June 28, 1938.)*"

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## RECORD EXCERPTS RELATING TO CONSTITUTIONAL GROUNDS

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The constitutional grounds were presented in briefing, oral closing argument and in three pleadings as are more fully noted below.

Almost all of the proceedings below were devoted on the face of the record to the two main propositions for review here, namely (1) Pimlico should be valued and its sale price tested at "full fair market value" and for its "highest and best use", and (2) Pimlico was never delicensed, but was authorized to operate under the regulatory scheme so that it had full value.

The following quotations show that those grounds for review under the Constitution were timely raised, but this does not mean that the quoted portions are by any means exclusive.

**(Proceedings In The Baltimore City Circuit Court — 1972-76)**

The following was raised on March 5, 1976 in a pre-trial brief, namely:

"(Management)

It is perfectly clear that management was not, and could not constitutionally be, a capital asset.

Management was a cost of doing business, was by virtue of the salaries paid an expense item, and was taken into account in the Pimlico profit and loss statements before capitalization of the net earnings.

* * *

The Trustee makes a *very cautious* subsidiary speculation that the Jockey Club might have attempted to obtain *special legislation* which would have closed Pimlico down as a race track to make way for the Jockey Club's entry into the industry as the owner of a boasted fifth track.

Beside the fact that such *special legislation* would have been *improper*, the simple point is that *there was no then existing legislation closing down Pimlico, not even in bill form. . . The then existing racing law was:* Md. Sess. Laws of 1946 (Spec. Sess.) Ch. 3, § 7; Md. Sess. Laws of 1947, ch. 502, § 7.

* * *

To amplify, in connection with the the 1947 racing reorganization bill (Bill 101), there was some boasting by the Jockey Club that the fifth race track provision, to be contained in Section 7, was not just a charter of freedom to the Jockey Club to become a



race track owner at a new track (R. 3408) but also would empower *the Jockey Club* (not the Racing Commission) to close Pimlico *if the Jockey Club wished to terminate its lease there* (T. 3—502-03; T. 4—67; R. 3226-27; 3231). Aside from the unconstitutional aspects of such purported legislation (delegation to a private group to eliminate a business competitor, *Mayor of Baltimore v. Radecke*, 49 Md. 217 (1878)), *Section 7 never contained any shut-down provision. The Trustee thought so lightly of any shut-down provision being added to Section 7 that it advised the Jockey Club that such a bill would be unconstitutional as private legislation* (Contit. of Md., Art. III, § 33 (1867) (special legislation prohibited)) and merely wrote the Maryland legislators who were sponsoring Bill 101 to the effect that racing should continue at Pimlico (T. 5—48; R. 3227; 3231; 4992). Thomas B. Butler, the trustee's President, also gave this view in the March 14, 1947 hearing on Bill 101 (R. 4992). Obviously, the issue was never in doubt, for amended Section 7 became law without disturbing the future of racing at Pimlico, whatever the Jockey Club chose to do, lease there or build elsewhere (R. 3389-90; 5140). Thus, Mr. Opie and Mr. D. L. Hopkins, the Trustee's officers, state that the lobbying by Clarence Miles, for which he was paid $33,500 out of the Trust, was a victory for the Trustee because racing was to continue at Pimlico (T. 5—41-42; R. 4550-51; 4648). The Jockey Club also recognized this result *at least two days before the sale* (T. 5—99-101; R. 3389-90; 5140).

* * *

. . . the representatives of the Trustee ignored responsible bidders who had been alerted through the sudden news leak to the possibility that Pimlico was for sale, bidders who Mr. Butler considered would

pay a higher price, namely, Mr. George Hocker (who represented the beer interests), Mr. Page of Woodcock McLear (who may have represented the Duponts) and the representatives of Roosevelt Raceway (who represented themselves) (R. 4992; 4860; 5164).

What these bidders must have known was that Pimlico Race Track was a world-famous race track of Triple Crown ranking and of the second oldest tradition in the Country, that it had always operated very profitably and that so long as it was the permier race track of the four existing ones in Maryland, moneywise, from the point of view of the State's Treasury, the legislature and Racing Commission would have been hard put not to have continued the uninterrupted licensing of the operation each season if the grandstand and other facilities were intact and the races were being conducted properly by a responsible group.

Furthermore, by March 19, 1947, these bidders would have also known, *as the Jockey Club itself did have to recognize*, that the ignominious efforts of the Jockey Club to create *the illusion* that the licensing of the Pimlico racing plant had to be tied to its management and no one else's ran afoul of reality and good grace, for, *by that date*, the patently outlandish, unconstitutional version of Bill 101 (amended Section 7) had been rejected on the floor of the Senate, the Bill being finally passed in the form in which it had originally issued from the Senate Finance Committee, where it had been corrected to allow *any* management to operate at Pimlico if the Jockey Club had gotten out (R. 3221-22). Md. Sess. Laws of 1947, Ch. 502, § 7, as amending, Md. Sess. Laws of 1946 (Spec. Sess.), Ch. 3, § 7.

Furthermore, even if the legislature early on had not realized that it was being used improperly and



had not rejected the Jockey Club's 'special legislation', such a notion written into positive law would still have had to have leaped the final hurdle of constitutional propriety, which in a clear case such as this of overweening, private 'race track grabbing' would have resulted most likely in the Jockey Club being earth-bound at this last constitutional barrier. Constitution of Maryland, Art. III, § 33 (1867) (special legislation prohibited); *Mayor of Baltimore v. Radecke*, 49 Md. 217 (1878).

* * *

In valuing Pimlico for sale, the Trustee deviated from the approach which a reasonable man would have taken. Thus, the Trustee *refused to capitalize the overall earnings of the race track*, and, instead, most detrimentally, *chose to capitalize only the rent which the Trustee had been receiving from the Jockey Club.*
***

In addition, the Trustee made no effort to value Pimlico by comparison to the prices at which other race tracks had sold.

* * *

It is respectfully submitted that the Trustee should be surcharged to the extent of the full capital loss of $6,795,359.[1] The Trustee should also be surcharged for all consequential damages, that is, interest, appreciation to offset inflation, and enforcement expenses. The Trustee should also have its commissions and attorneys' fees and expenses disallowed. (If there will be adverse capital gain tax penalties and interest, the Trustee should also be held liable for these.)

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[1]This figure of $6,795,359 was pre-trial. The post-trial figure changed slightly to $6,579,014. Refer to page 33, *supra*.

The universal rule adhered to in Maryland and elsewhere is that a trustee may not sell a fiduciary asset for substantially less than its fair value and is subject to surcharge at the utmost value of the property for the capital loss or price inadequacy. [citations omitted] ***

* * *

CAPITALIZED EARNINGS:

The capitalized earnings method of valuing a business property for purposes of sale has long been recognized by the courts and has been applied in instances where a trustee makes a sale of a going concern. *E.g., Northern Acceptance Trust 1065 v. AMFAC, Inc.*, 59 F.R.D. 116 (D. Haw. 1973); *Rippey v. Denver United States Nat'l Bank*, 273 F. Supp. 718, 731 (D. Col. 1967); *Warren v. Baltimore Transit Co.*, 220 Md. 478, 483, 486-87 (1959); *Brooke v. Berry*, 2 Gill 83, 98-99 (Md. 1844); *Application of Delaware Racing Ass'n*, 42 Del. Ch. 406, 415, 421-23, 213 A.2d 203, 209, 212-13 (1965) (going concern appraisal of Delaware Park race track); *In Re Westhall*, 125 N.J. Eq. 551, 553-54, 5 A.2d 757, 758 (1939); . . . *Note: Valuation of Dissenter's Stock Under Appraisal Statutes*, 79 Har. L. Rev. 1453, 1456-71 (1966); 1 *Bonbright, Valuation of Property*, 233, 252 (1937); 1 *Dewing, Financial Policies of Corporations*, 287-95, 306-07, 369-401 (5th ed. 1951); *Graham and Dodd, Security Analysis*, 454-58 (3rd ed. 1951); *Cf. Winepol v. State Roads Comm'n*, 220 Md. 227, 230-31 (1959). ***" (Excerpts quoted above are taken from the following record pages: R. 7100, 7122, 7124, 7043 44, 7073, 7085, 7088)

Additionally, the following was raised in closing oral argument, in the post-trial brief and in the motion for reconsideration (T. 84—5-6, 12; R. 7953, 7919), to wit:



"... the Safe Deposit [Trustee] sponsored in the Senate Finance Committee hearing an amendment to Bill 101 of its own, that is, the separate Amendment No. 7, as follows:

'Amendment No. 7—

Strike out lines 20 to 25, inclusive, Section 7, Page 5 of the Amendment to Senate Bill 101, and insert in lieu thereof the following:

'a new track location in the State; and provided further that in the event that the said Pimlico Race Track is permanently abandoned by the said Maryland Jockey Club, as aforesaid, the said Maryland Racing Commission is hereby authorized and empowered to grant a license to conduct racing and award dates for the holding or conducting of races or race meetings to any other person, association or corporation at said Pimlico Track for a period not exceeding twenty-five (25) days in one year, it being the intent, purpose and effect of this proviso, to preserve and continue racing at said Pimlico Track, in Baltimore City, notwithstanding its abandonment by said Maryland Jockey Club and for the purpose of carrying out the provisions of this proviso, the said Racing Commission is authorized and empowered to permit the aggregate of dates awarded for the holding or conducting of races or race meetings under this section to exceed One Hundred (100) days in one year but not to exceed One Hundrew (sic) Twenty-five (125) days in one year' (CC Ex. 153, Senate Journal, March 18, 1947, p. 1596)

One can see quite clearly that the Safe Deposit was well aware of the fact that no revision of Section

7 theretofore had limited the general licensing provisions, that is, "*Any person or persons, association or corporation*" could apply for a license.

* * *

As the completely amended Bill [101] came out of the Senate Finance Committee with a favorable report to the Senate on March 18, 1947, together with the separately attached amendments Nos. 1 to 9, it was clear that the proposed revision of the licensing-dating provisions of Section 7 still merely allowed the Maryland Jockey Club to move to a new, fifth track and did not confer a power on anyone to shut down Pimlico for racing under circumstances where the Maryland Jockey Club might get out or might get out and move to another location.

There was nothing contained in the added proviso at the end of Section 7, as thus revised, which rolled back or placed any cancellation on the pre- and then existing *general licensing-dating provisions* of Section 7, that is:

> '*Any person or persons, association or corporation*, desiring to conduct racing within the State of Maryland during any calendar year, shall apply for a license so to do . . . provided, further, that the Commission shall issue no license nor award any dates for racing on any tracks or places for holding races in Maryland, unless on such tracks or places for holding races, races have been run or held at least once in every year for a period of three consecutive years immediately prior to May 6, 1943. . .' (Emphasis Supplied)

If the proposed amendment of Section 7, that is, Bill 101 as reported out of the Senate Finance Committee on March 18, 1947, had sought to eradicate the foregoing general licensing-dating



provisions, in particular, "*Any person or persons, association or corporation . . .*", and in lieu thereof had narrowed the legislative intent to just authorization of the Maryland Jockey Club rather than "Any person or persons, association or corporation . . .", then there would have been cause for alarm over such special, unconstitutional legislation. ***

* * *

It is most interesting to note that on March 20, 1947, many Senators were convinced that in passing the favorably reported version of Bill 101 *itself* to third reading by a vote of 17 to 11 that the effect of the Bill *itself* was merely to confer on the Maryland Jockey Club the right to move from Pimlico (CC Ex. 153, Senate Journal, March 19, 1947, pp. 1700, 1703; CD Ex. 45, *Baltimore News*, 'Confusion Over Amendments to Measure' by William W. Mahoney, March 20, 1947). In the news article just cited, it was reported under date line from Annapolis on March 20th that:

> 'After the bill (Bill 101) had finally passed by a 17-11 vote many members . . . expressed doubt as to whether the bill accomplished anything besides granting permission to the Jockey Club to move.'

* * *

By its proposed Amendment No. 7, Safe Deposit was dangerously doing the unnecessary by bringing the matter into issue with the risk, where there had been none before if it had done nothing, that its Amendment No. 7 might be voted down with the implication left in the legislative history that the Legislature did not want racing to continue at Pimlico if the Maryland Jockey Club got out or got out and moved to another location. ***

The obvious dive which Safe Deposit was taking through its Amendment No. 7 was prevented by the Legislature itself.

When Amendment No. 7 came up for first and second reading on March 19 and 20, 1947, the Senate *passed* Amendment No. 7 (CC Ex. 153, Senate Journal, March 19, 1947, pp. 1670, 1687, 1699-1703, 1709-10, 1723).

The success of Amendment No. 7 probably came as a great surprise to the legislative lobbyists for the Safe Deposit and the Maryland Jockey Club.

On March 21, 1947, the news that the Safe Deposit, as Trustee had sold Pimlico to the Maryland Jockey Club obviated the need to further consider Amendment No. 7, which was then moot, and on motion, the Senate approved the withdrawl of the Amendment from third reading (CC Ex. 153, Senate Journal, March 19-20, 1947, pp. 1723, 1724, 1730, 1731, 1739-40, 1743, 1777).

On March 22, 1947, the Senate voted on Bill 101 as reported to it from the Senate Finance Committee and passed it on to third reading without Amendment No. 7. Thereupon, it went over to the House of Delegates for their consideration (CC Ex. 153, Senate Journal, March 21-22, 1947, pp. 1824, 1847, 1883).

The history of the Bill after that involved numerous drafting changes and messages between the two houses of the Legislature, whch led to an impass that was resolved by a conference committee version of the Bill and eventual passage of that version by both houses. (CC. Exs. 153, 153A).

The conference committee version of the Bill became law when it was signed by the Governor on



April 16, 1947 to take effect on June 1, 1947. (Md. Sess. L. of 1947, Ch. 502; CC Ex. 173).

* * *

As the record shows, the only people Safe Deposit, as Trustee were fooling with Amendment No. 7 down in Annapolis were themselves. *** During the trial, the counter-complainants encouraged the trustee to put their legislative expert, Mr. Clarence W. Miles, on the stand to explain all about Amendment No. 7. However, for some unfortunate reason, Mr. Miles was unable to attend court because of his health although he apparently was well enough to attend his office in order to write a letter to the Court (Court Ex. 4A). The Trustee seemed reluctant to submit Mr. Miles to a medical examination.

In order to move the spotlight off of itself and what it had attempted to do to the Hammond Trust through Amendment No. 7, counsel for the Trustee have lached onto the fabricated hue and cry of the Safe Deposit back in 1947 that the all-powerful Maryland Jockey Club was going to obtain from the Legislature a special power to shut Pimlico down for racing at the whim of the Maryland Jockey Club.

While Mr. Parr [President of the Maryland Jockey Club at the time in 1947] had stated for the record that this sort of approach for a shutdown power had failed in the Senate Finance Committee hearing on Bill 101 on March 14, 1947, the Trustee puts forward the speculation that even so the mightly Maryland Jockey Club could have gotten the power from the Legislature to shut Pimilico down for racing unless the Trustee sold it to them.

It is self-evident that this type of nonsense is just that. For a fact, it never occurred. Even if the Maryland Legislature had decided to go into the business of conferring on one of two or more business

competitors the public power to shut down the other competitors, it is clear that such a delegation of public police power to a private group would constitute special legislation and would be unconstitutional under the Maryland Constitution, as well as under the Fourteenth Amendment of the Federal Constitution. Constit. of Md., Art. III, § 33 (1867) (special legislation prohibited); *Mayor of Baltimore v. Radecke*, 49 Md. 217 (1878) (the most famous anti-corruption case in the United States and squarely on point).

In a loose moment, even the Trustee's President, Thomas B. Butler, admitted that any legislation which gave the Jockey Club the public power to decide whether racing would occur at Pimlico would have been improper as special legislation (R. 3227, 3231). ***" (Excerpts quoted above are taken from the following record pages: R. 8176, 8174-75, 8178, 8177-78, 8179-80)

**(Proceedings In The Maryland Court of Special Appeals—1977-79)**

The foregoing constitutional grounds were reiterated in the appellate brief proffered to the Court of Special Appeals. For example, it was proffered in that brief on the central issue of licensing that a shutdown power would have been improper, to wit:

> "While both Mr. Parr and Mr. Opie stated that this sort of approach for a shutdown power had failed in the Senate Finance Committee hearing on Bill 101 on March 14, 1947, the Trustee puts forward the speculation that even so the mighty mighty Jockey Club could have gotten the power from the Legislature to shut Pimlico down for racing unless the Trustee sold it to them.



> It is self-evident that this type of nonsense is just that. For a fact, it never occurred. Even if the Legislature had decided to go into the business of conferring on one of two or more competitors the public power to shut down the other competitor(s), it is clear that such a delegation of public police power to a private group would have constituted *special legislation* and would have been unconstitutional under the Maryland Constitution, as well as under the Fourteenth Amendment of the Federal Constitution. United States Constitution of 1787, Fourteenth Amendment, Section 1; Constitution of Maryland of 1867, Declaration of Rights, Art. 23; Constitution of Maryland of 1867, Art. III, § 33 (special legislation prohibited); *Mayor of Baltimore v. Radecke*, 49 Md. 217 (1878) (the most famous anti-corruption case in the United States and squarely in point).
>
> In a loose moment, even the Trustee's President, Thomas B. Butler, admitted that any legislation which gave the Jockey Club *the public power* to decide whether racing would occur at Pimlico would have been improper as *special legislation* (E. 845-46, 849-50, 2006)." (Excerpt quoted above is taken from the following appellate papers: Brief of Appellant, Peter H. Madden, p. 204; Brief of Appellants, Michael Madden and Christina Madden, pp. 1-2; Reply Brief of Appellant, Michael Maden, p. 33; Reply Brief of Appellant, Peter H. Madden, p. 1)

Of course, those briefs were rejected or not considered by the Court of Special Appeals as is more fully described above at pages 39-40.

The action in suppressing the appellate briefing was asserted to violate the Fourteenth Amendment due process guarantee under the Federal Constitution. This was done by the

motion, page 18 thereof, which the Court of Special Appeals refused to receive and is *dehors* the record as is more fully explained above at page 40, footnote.

In addition, the motion for reconsideration raised the constitutional grounds once again as follows:

"FOR POINT I—WHAT THIS COURT HOLDS

This Honorable Court [Court of Special Appeals of Maryland] has held as a matter of law in this case as follows:

(a) *PROPOSITION #1 ('Land Salvage Value' for Regulated Business, Not 'Going Concern Value' Based on Productivity):* ***

* * *

(b) *PROPOSITION #2 (Only the Jockey Club, Purchaser, Could Have a License):* ***

* * *

(c) *PROPOSITION* #3 (The Foregoing PROPOSITIONS #1 and #2 Are Constitutional): ***

* * *

FOR POINT II—WHY WHAT THIS COURT HOLDS IS WRONG

The foregoing holding and limited fact-finding and omitted fact-finding of this Court [Court of Special Appeals of Maryland] are wrong for the following reasons:

(a) *CORRECTION #1 ('Going Concern Value' Based on Productivity For Regulated Businesses, Not 'Land Salvage Value'):* ***

* * *

*Presumption of Law That An Applicant For A License Or Permit Will Be Able To Comply With The Governmental Regulatory Scheme And Shall*



*Be Presumed To Be Entitled To A License or Permit (Including Retaining It) Unless The Sovereign Shows Cause Under The Police Power And The Statutory Scheme Why Said License Or Permit Should Be Withheld Or Suspended Or Revoked:* ***

* * *

*The Maryland Race Track Licensing Statute In Force At The Time Of Sale (Including All Proposed Bills And Amendments Thereto Before The Senate At The Time) Properly Provided That The Class Of Licensees Was General, But That The Race Track Locations Were Special So That If Any Applicant Had One Of The Special Race Track Locations, He Could Apply For A License And Racing Dates As A Member Of The General Licensee Class And It Was Mandatory For The Racing Commission To Issue A License And Racing Dates To Said Applicant For The Special Race Track Location Unless The Racing Commission Was Able To Point To Some Reason Why Said Applicant Was Not Complying Or Would Not Comply With Its Regulations, Rules Or Directives:*

Maryland Session Laws of 1946 (Spec. Sess.), ch. 3, Sec. 1, para 7 contained the race track licensing provisions in force on the date of sale as follows:

'*Any person or persons, association or corporation*, desiring to conduct racing within the State of Maryland during any calendar year, shall apply to the Maryland Racing Commission for a license so to do. ***' (Emphasis added)

Senate Bill 101 (Sec. 7) being considered as of the date of sale *likewise so provided* for *a general*

*class of licensees* who would be presumptively entitled to a license in exactly the same language just quoted above from the law then in force.

Amendment No. 7 to said Bill 101 (Sec. 7) being considered as of the date of sale *likewise so provided* and in addition tied the general class of licensees to the specifically named Pimlico Race Track location.

Article 78B of Flack's Maryland Code Annotated for 1939, para 10 then in force further provided:

'. . . and such license shall be subject to suspension or revocation by the Commission for *any cause whatsoever* which the Commission may, in its discretion, deem sufficient. If any license is suspended or revoked, said Commission *shall state publicly its reasons* for so doing, *and cause an entry of such reasons to be made on the minute book of the Commission*, and its action shall be final, provided, however, the propriety of such action shall be subject to review, upon questions of law only, by the Circuit Court of the County, within which such license was granted, or by the Baltimore City Court, if such license shall have been granted in Baltimore City, the action of the Commission to stand unless and until reversed by the Court.' (Emphasis supplied)

Subject to Constitutional limitations and the Legislature's own mandate to it, the Racing Commission had sweeping powers to issue regulations, rules and directives as to all aspects of the licensed racing and parimutuel operations to the minutest detail under Maryland Sess. Laws of 1946 (Spec. Sess), ch. 3, Sec. 1, para 11



so that it could have had *no cause* to withhold a license or to have suspended or revoked the same if the owner or personnel were *in compliance* with its regulations, rules and directives since such action on its part would have been 'arbitrary, capricious and unreasonable' and subject to judicial review and correction to conform with the general statutory scheme and the intent of the Legislature and the judicially applied constitutional guarantees discussed in CORRECTION #3 below.

(b) *CORRECTION #2 (A License Could Be Awarded To Anyone Owning Or Having The Use Of Pimlico)*: Contrary to the holding of this Honorable Court in PROPOSITION #2 above, it was the law of Maryland that the Jockey Club, a corporation, was *not* the only legal entity which by law had the right to apply for and receive a license to operate a horse racing business at the Pimlico Race Track location as of March 21, 1947, which was the date on which the Trustee of the Hammond Trust sold Pimlico Race Track in its entirety and without restriction on its use to the Jockey Club for $1,115,000; and therefore, by law, *anyone else* could properly be licensed by the Racing Commission to conduct a horse racing business at Pimlico Race Track, either thoroughbred or trotting races, on that date of sale, if such person was the owner of the race track plant or his agent or lessee or purchaser; and in any event, since by law the class of licensees was general and not special for that race track, therefore, the Racing Commission could not have properly exercised its power to license only the Jockey Club and no one else to operate the horse racing business at Pimlico on and after the date of sale since as a matter of law

(1) '*Any person or persons, association or corporation* desiring to conduct racing within the State of Maryland during any calendar year, shall apply to the Maryland Racing Commission for a license so to do. ***' was the law and created *a general* class of licensees, subject to the requirement that a license would be issued only as to each of the four existing one-mile race tracks, Pimlico being one of the four.

Md. Sess. L. of 1946 (Spec. Sess.),
Ch. 3, Sec. 1, para 7.

Nothing in Senate Bill 101 changed or could have changed the foregoing racing statute as of the date of sale. The Bill merely authorized the Jockey Club's fifth race track as an additional, specially authorized race track location. This was in addition to the four previously authorized race track locations which were pre-established under the licensing-by-those-locations concept of the statute. Senate Bill 101 did not disturb that status which Pimlico had at, and retained after, the date of sale. Nothing in Amendment No. 7 to Bill 101 changed or could have changed the foregoing racing statute quoted above as of the date of sale. That Amendment merely provided that a member of the general class of licensees could have a license to conduct racing at the specifically named Pimlico Race Track location.

(2) Therefore, under the principle of separation of powers, anyone opening up the law books to the scheme for race track regulation on March 21, 1947, and even thereafter with the adoption of the proposed legislative bills discussed above and in process of becoming the law, would have found that as to Pimlico Race Track



(a) a general class of licensees could be licensed by the Racing Commission to operate Pimlico for racing;

(b) there was a special class of race track locations which could be licensed and Pimlico was one of the four locations referred to in that class; and

(c) Senate Bill 101 and Amendment No. 7 thereto did not change that scheme, but did authorize that a fifth race track location could be licensed, *if ever materializing.*

In light of the legislative scheme (a), (b) and (c) above and the mandate thus imposed on the Racing Commission as the instrumentality under the law for the details of licensing and regulation of the field in the public interest, it is not and would not properly be within *the adjudicatory power* of this or any other court (d) to re-write the existing law then in force and governing this case, (e) to speculate that it may have been re-written in some fashion other than what it positively provided for, or (f) to conclude *without factual evidence* what the Racing Commission would have done about issuing a license for Pimlico under its legislative and tax-gathering powers and duties over and with respect to that most popular and specifically authorized race track location by its mandate to license horse racing there to a general class of licensees for the benefit of the public and to raise racing license fees and taxes there for the State.

The basis for why this or any other Court lacks the power to change the law or to usurp the delegated legislative function of the Racing Commission as to whether *in point of fact* it would or would not issue a license under its primary jurisdiction and legislative power (subject to

judicial review, of course) lies in the Maryland constitutional provision guaranteeing *separation of powers*:

Constitution of Maryland of 1867, Declaration of Rights, Article 8

*Bruce v. Dir., Chesapeake Bay Aff.*, 261 Md. 585, 606-07 (1971) ('The drafting of legislation is within the exclusive sphere of the General Assembly. Whether the regulations imposed by the legislation shall consist of (naming them) . . . is not within the province of the courts to decide. Our only admonition would be that, whatever controls may be a reasonable exercise of the police power and apply to all citizens without disparity.')

*A fortiori*, it is because of that very principle of separation of powers that the courts hold, as discussed above in CORRECTION #1, that a citizen shall be presumed to act in compliance with the law initially and shall therefore be presumed to be able to receive a license or permit to operate a business and to enjoy the full use, value and productivity of his property, *unless and until* the sovereign may prove and find and be sustained in finding (if judicial review is sought) that said applicant has not or will not, as a matter of fact, be able to conduct his business and operate his property in compliance with the regulatory scheme uniformly applied by the sovereign.

(c) *CORRECTION #3 (The foregoing Corrections #1 And #2 Are Constitutional; But The Foregoing Propositions #1 And #2 Are Unconstitutional)*: Contrary to the holding of this Honorable Court [Court of Special Appeals of Maryland] in PROPOSITION #3 above that its PROPOSITIONS #1 and #2 above are constitutional, the opposite is the law and those first two PROPOSITIONS #1 and #2 (which represent holdings by this Honorable Court on which all of its incorrect analysis rests as to its PROPOSITIONS #4 through #9 above and which then likewise fall) are *un*constitutional in all particulars under the Maryland Constitution and under the United States Constitution in that if those PROPOSITIONS #1 and #2 were to apply, the property owner of Pimlico Race Track, that is, the Trust or its agent or lessee or purchaser is thereby and would have been at any time thereby deprived of its property, and the value of its property and the use of its property contrary to the the protections afforded under said Constitutions to all citizens in their property and in their right to do business and in their right to have the full use and value of their property for proper purposes recognized by the State without improper confiscation as those reserved and paramount rights are accorded by (1) the Law of the land, (2) the priveleges and immunities of United States citizens, (3) the due process of law, (4) the equal protection of the laws, (5) the protection from special laws, and (6) the protection from judicial usurpation of the legislative law-making power and the primary jurisdiction of the Racing Commission to regulate and license Pimlico Race Track for operation since as a matter of law



(1) The police power of the State of Maryland conferred on the Legislature and the Racing Commission by delegation from the people, who retained all powers, rights and priveleges and immunities not thus extended, in and by the Constitutions of Maryland and the United States, was *a limited police power* and thus could not be utilized beyond its fair and non-discriminatory and reasonable granted public purpose and clearly

could not be utilized as a private or arbitrary tool for expropriation or corruption in violation of any citizen's reserved constitutional rights, including his right to his property and his right to do business and his right to have and enjoy the full use and value of his property and business, including, as well, his right to be licensed to operate his property as and for a business for profit and full value to him subject to his compliance with the sovereign's proper utilization of the police power for the common good and public interest. And therefore a proper utilization of the sovereign's police power would require the sovereign to adopt a general and uniform regulatory scheme *on its face consistent with and limited to* specific and meaningful goals to be achieved for the common good and public interest. And therefore a proper utilization of the sovereign's police power would require the sovereign or its delegate *to administer* said general and uniform regulatory scheme in each case *consistent with and limited to* specific and meaningful goals to be achieved for the common good and public interest. Expressly or impliedly, the very adoption of the regulatory scheme itself *commands* that the public good and public interest are served and promoted by the very subject of the regulation and that it shall not be prohibited or destroyed, but rather shall be fostered for the benefit of the State, *i.e.*, in the instant case the subject of horse racing at regulated race tracks providing parimutuel wagering for public amusement and the license fees, taxes and revenues of the State, nevertheless, made subject to the *limited regulatory scheme*, with which, of course, any citizen might comply and by which such citizen was then entitled to a license to conduct the regulated activity as and for his business at full 'going concern value'.



In the above regard, since 1920, the Maryland Legislature had specifically *commanded* that horse racing at regulated race tracks providing parimutuel wagering for the public amusement and the license fees, taxes and revenues of the State was for the common good and public interest and should be promoted and fostered in the State, to wit:

> "An Act *to provide for* the regulation, control and licensing of *horse racing within the State of Maryland*, to create a Maryland Racing Commission, and to prescribe its powers and duties, and providing for salaries and expenses therefor, and to provide for the license fees to be charged and taxes to be collected *for the conduct of horse racing within the State of Maryland* and the disposition thereof." (Md. Sess. L. of 1920, ch. 273) (Emphasis added)

Given that general legislative purpose and given the regulatory scheme discussed above of (a) a general class of licensees, and (b) a special class of race track locations inclusive of Pimlico, it is clear that the withholding of a license or the suspension or revocation of an issued license would have been improper as a matter of *statutory command* and would have been reversible as a matter of law and the following constitutional guarantees, which likewise would have compelled the same plan and utilization of Pimlico under a grandfather right to its full use and value as existed prior to the imposition of the legislative scheme even if by the design of (a) and (b) above, the Legislature itself had not conferred the the same rights on the owner of Pimlico, to wit:

> Constitution of Maryland of 1867, Declaration of Rights, Article 23 (the Law of the land)

United States Constitution of 1787, Amendment XIV Section 1 (priveleges and immunities clause; due process of law clause; and equal protection of the laws clause)

Constitution of Maryland of 1867, Article III, Section 33 (the prohibition of special laws)

Constitution of Maryland of 1867, Declaration of Rights, Article 8.

Under those constitutional rights and guarantees, each citizen is protected from the unreasonable exercise of the police power by the Legislature (and even courts, too) should the regulatory scheme (or the adjudication) impact unfairly and in a discriminatory and unreasonable manner on the citizen's reserved rights *to do business* and the citizen's reserved rights *to have and enjoy the full use and value of his property and business* free from *improper confiscation or burden* and free from *public taking or burden or expropriation for private use*. The following cases uphold and exemplify those principles, rights and guarantees in applying the foregoing and enumerated Constitutional standards, namely:

*Mayor of Baltimore v. Radecke*, 49 Md. 217 (1878) (a carpenter will be protected in his business from an arbitrary and discriminatory administering of a steam engine licensing law)

*Arnsperger v. Crawford*, 101 Md. 247, 251-52 (1905) (the Law of the land forbids that private property be condemned for private use)

*Goldman v. Crowther*, 147 Md. 282, 307 (1925) (zoning ordinance business permit case—holding that reserved right of citizen 'to



acquire and own property, and to deal with it and use it as the owner chooses so long as the use harms nobody, is a natural right' guaranteed by the due process clause and is paramount to the unreasonable or arbitrary exercise of the police power)

*Dasch v. Jackson*, 170 Md. 251, 252, 264-70 (1936) ('The legislative power to regulate a business, trade, or occupation, or to impose a tax thereon, may not be exercised arbitrarily or capriciously, or in such manner as to deprive the individual of rights, priveleges, immunities, or property to which he is entitled as a matter of natural justice and common usage, except for the protection of some real and substantial public interest, nor can such power be exerted in such a manner as to impose upon members of a selected class burdens which are not shared by others in like circumstances.')

*Riden v. Philadelphia, B. & W. R. R. Co.*, 337 Md. 336, 339-40, 344-45, 346-47 (1943) (due process of law prohibits taking of private property for private use under the condemnation power and under the police power—'horse racing has beenone of the most popular sports in Maryland since Colonial days and has long been fostered by this State')

*Benner v. Tibbitt*, 190 Md. 6, 7, 20-21 (1948) ('the state legislature, cannot, however, use the police power to deprive an individual of property rights by a plebiscite of neighbors or for their benefit. Such action is arbitrary

and unlawful, *i.e.*, contrary to Art. 23 of the Declaration of Rights.—Any interference with the unrestricted use of private property by the exercise of the police power must be reasonably necessary to the public welfare.')

*Easter v. Dundalk Holding Co.*, 199 Md. 303 (1952) ('A taking of one person's property for the private use of another, even with just compensation, is a deprivation of property without due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment of the Constitution of the United States and no court of law or equity has the authority to compel a landowner to surrender his property to another person in exchange for a sum of money. Where a judgment of ejectment had been obtained, an equity court, in a suit by the loser, cannot set a valuation on the land and require the winner to convey it to him upon payment of the amount of the valuation.')

*Columbia Hills Corp. v. Mercantile-Safe Deposit & Trust Co.*, 231 Md. 379 (1963) (same as immediately above comment)

*Bruce v. Dir., Chesapeake Bay Aff.*, 261 Md. 585, 606-07 (1971) ('The drafting of legislation is within the exclusive sphere of the General Assembly. Whether the regulations imposed by legislation shall consist of (naming them)... is not within the province of the courts to decide. Our only admonition would be that, whatever controls may be a reasonable exercise of the police power and apply to all citizens without disparity.')

It is clear from the foregoing that the police power and any licensing power thereunder was



never constitutionally intended to be applied as a lever for the stripping away of the full 'going concern value' of regulated business assets.

While the horse racing area is pervasively regulated, the business of race tracks and parimutuel wagering are fostered and in the public interest in this State.

The legislative scheme never allowed any of the following, nor would the constitutional guarantees discussed above, namely: (a) a right for the Jockey Club to be the exclusive licensee at the Trust's Pimlico Race Track, (b) the right to take for its private use the profits and the use of Pimlico Race Track apart from leasing or contracting for or purchasing the race track on price and terms dictated by the owner-Trust, and (c) the right to have the Trust not compete against it if the Jockey Club wished to build a fifth race track and desired not to face the awesome competition which Pimlico would inevitably provide, *i.e.*, the private right to shut Pimlico down and take it off the list of specifically authorized race track locations.

Stated affirmatively, Pimlico was always available to be licensed to 'Any person or persons, association or corporation' applying for a license and owning or having the use of the race track and otherwise complying with the Racing Commission's regulations, rules and directives.

Accordingly, Pimlico retained its 'going concern value', whether sold to the Jockey Club, whether sold to any other purchaser, who would obviously pre-clear that a license could be obtained, or whether the Trust retained the track and installed its own wholly owned management group or corporation (straight or under lease arrangement).

The holding by this Court [Court of Special Appeals of Maryland], with all due respect, that 'land salvage value' is the valuation criterion and that 'going concern value' is not, is absolutely falacious and illegal.

For that reason reason alone, ALL OF THIS COURT'S PROPOSITIONS #1, #2, #3, #4, #5, #6, #7, #8 (except for the burden of proof being on the Trustee to show fairness), and #9 are improper and meaningless holdings as a matter of law since the first three propositions are wrong as stated above in CORRECTIONS #1, #2, and #3, and the other six, depending on the proposition that 'land salvage value' is controlling to the exclusion of the higher 'going concern value', are likewise wrong and are based on a false, primary premise shown to be wrong in CORRECTIONS #1, #2 and #3 above.

In effect, there is nothing left of the Court's holding except as to the burden of proof point just mentioned and excepted above.

The rationale being wrong, the decision of this Honorable Court is wrong.

FOR POINT III—SINCE THE VALUATION CRITERION CONTROLLING HERE IS 'GOING CONCERN VALUE', AND THE COURT HAS APPLIED AS A MATTER OF LAW A DIFFERENT AND LESSER STANDARD OF 'LAND SALVAGE VALUE', THIS CASE MUST BE COMPLETELY REDECIDED AND REREASONED ON THE MERITS AS TO LAW AND FACT-FINDING.



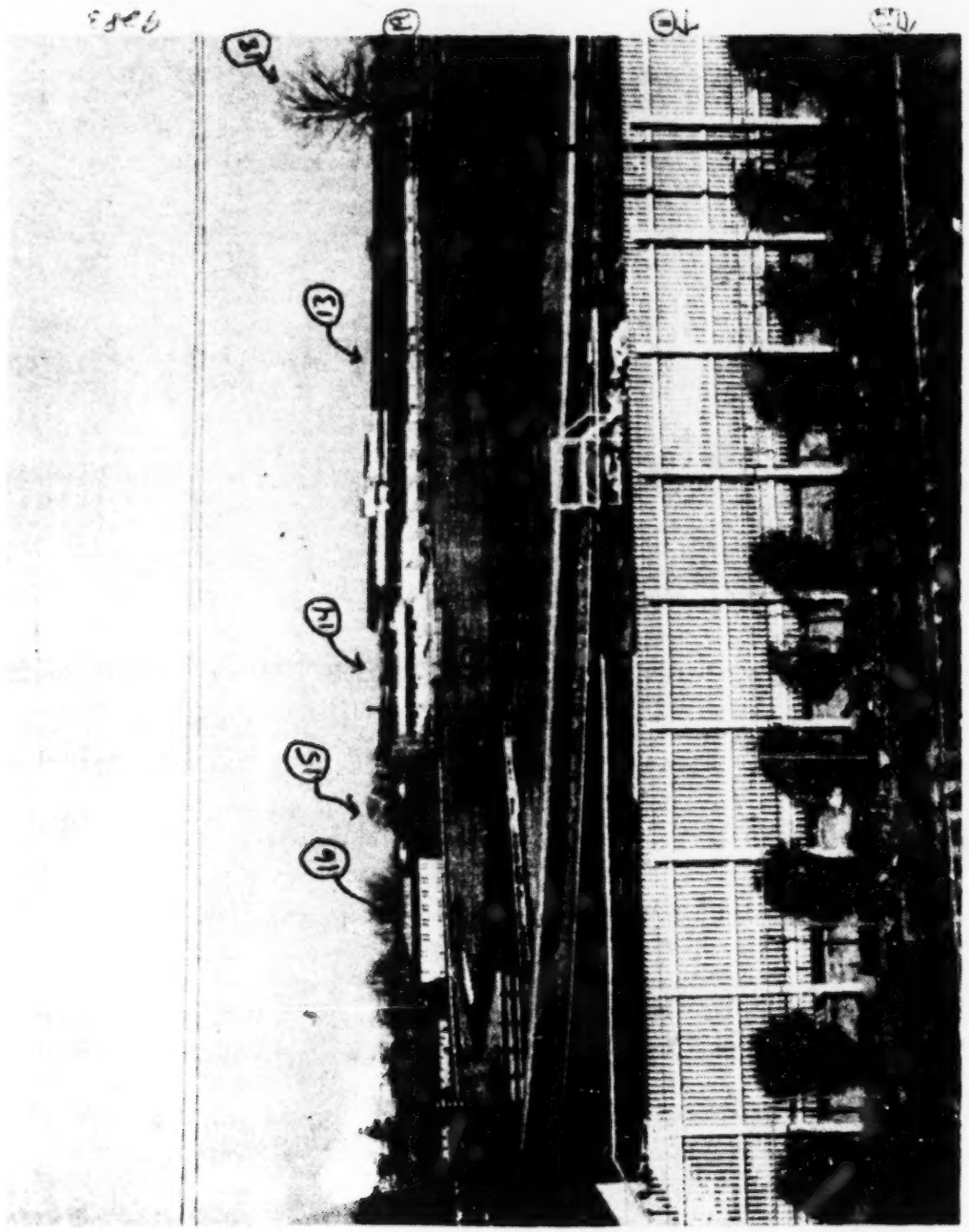
Since proper application of the trust law, statutory law and constitutional law compels that 'going concern' value, not distress sale 'land salvage value' is the only basis for valuation and constitutionally required valuation in this case, it is hereby the request of this applicant that the Court reconsider and rereason its prior decision and opinion dated and filed 'reported' March 7, 1979 in its entirety and that a new decision and opinion be made in conformity with the record and the record extract and the Madden appeallants briefs and reply briefs as enumerated and set forth in paragraph 3(a) through (i) above and therefore enter judgment for the Madden appellants...***" (Excerpts quoted above are taken from the following filed but unnumbered appellate paper: Motion for Reconsideration filed in the Maryland Court of Special Appeals on April 6, 1979, pp. 3, 4, 13-31)

**(Proceedings In The Maryland Court of Appeals—1979)**

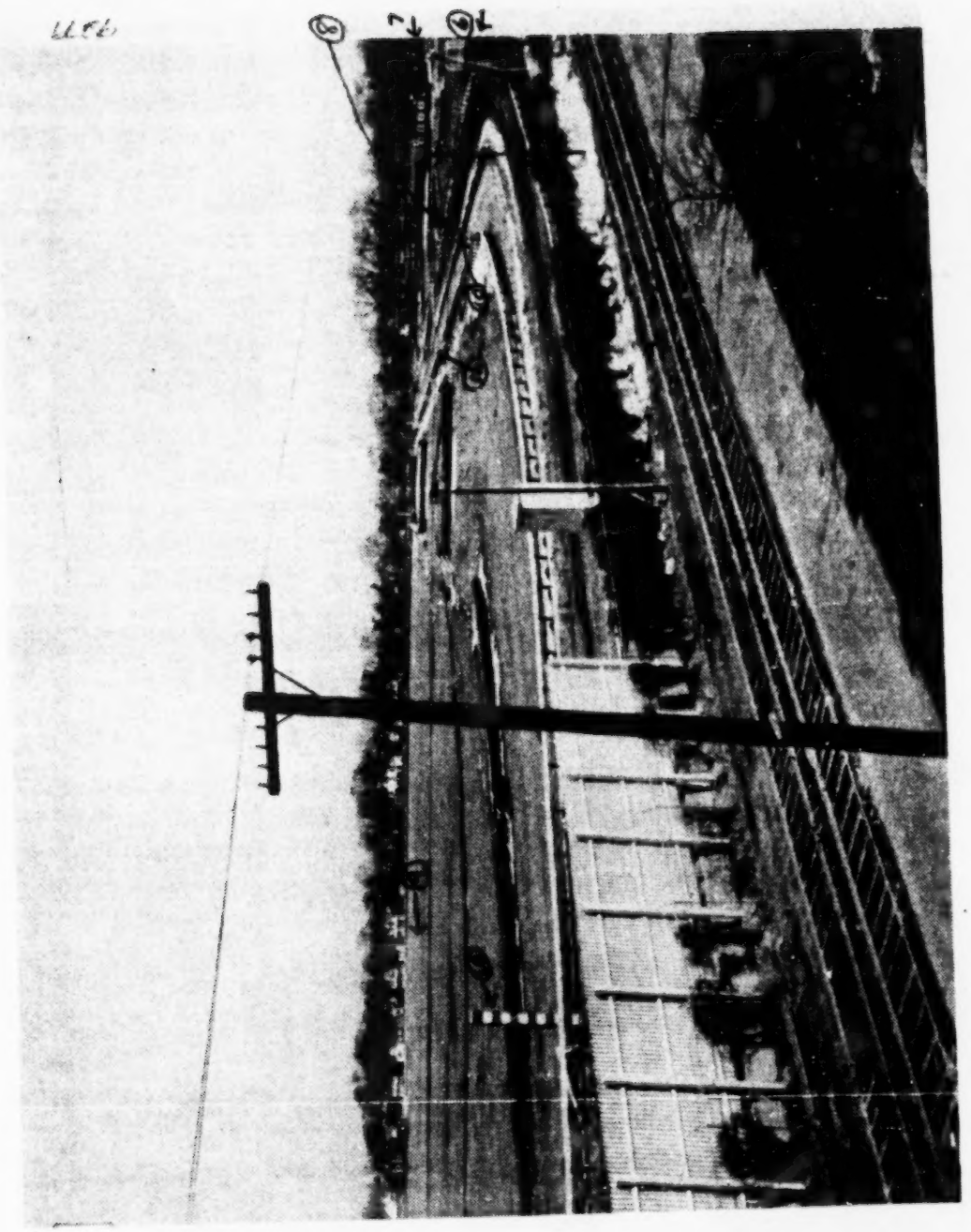
The same constitutional grounds were raised in the petitioner-remaindermen's petition for full review by writ of certiorari filed in the court of last resort below, the Court of Appeals of Maryland.

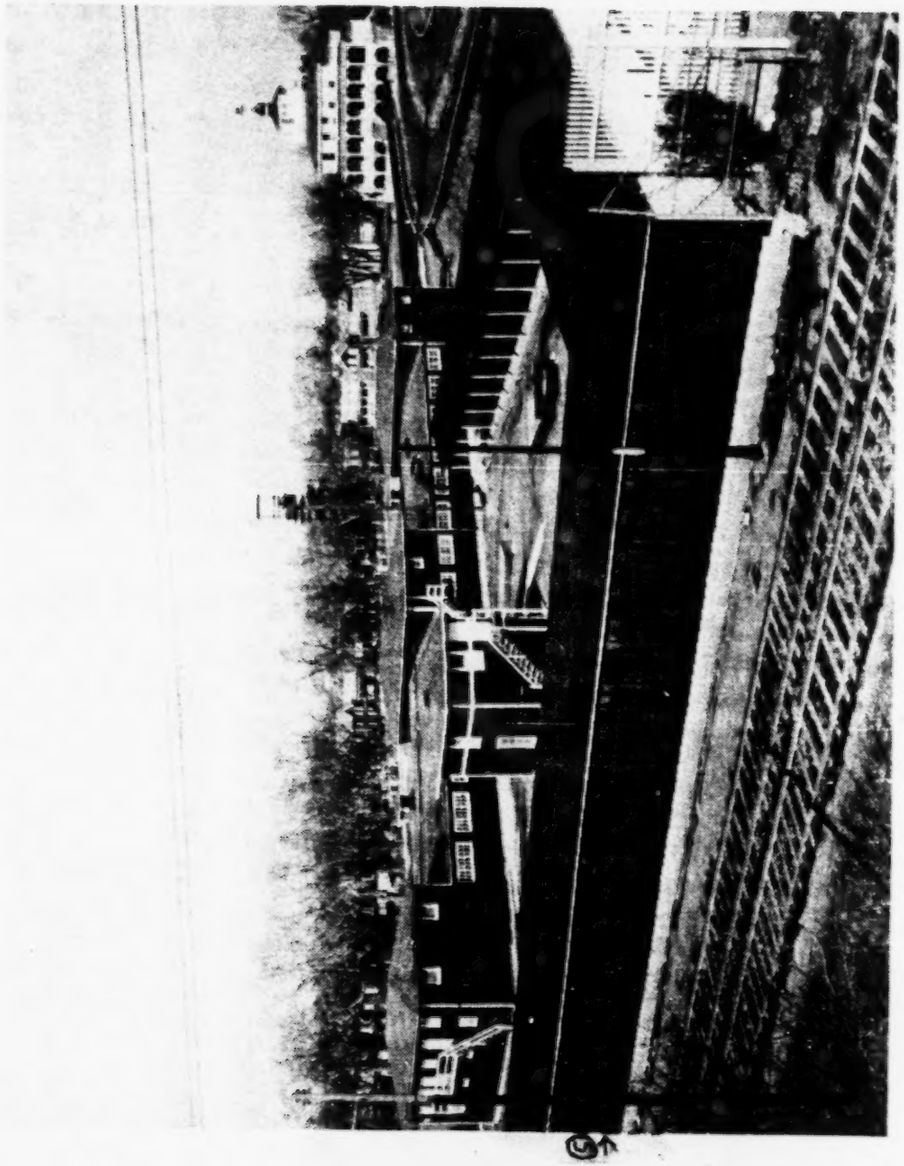
**(Disposition Below of The Constitutional Rights)**

The Maryland judicial branch have disregarded and denied the constitutional rights raised below.









## CERTIFICATE OF SERVICE

I, Peter H. Madden, Esq., attorney of record for the Petitioners herein, with offices as indicated hereinbelow, do hereby certify, depose and say that on September 4, 1979, I served three copies of the aforegoing Petition for Writ of Certiorari To The Court of Appeals of Maryland and To The Court of Special Appeals of Maryland and three copies of the accompanying Entry of Appearance on each of the following named persons or attorneys herein at the address for each as indicated hereinbelow, by mailing said copies thereof, in a duly addressed and enclosed wrapper, together with first class postage prepaid thereon, as follows: TO: H. Vernon Eney, Esq., Attorney of Record for Respondent Mercantile-Safe Deposit and Trust Company, in its individual capacity, Venable, Baetjer & Howard, Mercantile Bank & Trust Building, Baltimore, Maryland 21201; J. Cookman Boyd, Jr., Esq., Attorney of Record for Respondent Mercantile-Safe Deposit and Trust Company, Trustee u/w William R. Hammond, deceased, 9 W. Mulberry Street, Baltimore, Maryland 21201; Clarke Murphy, Jr. and Peter Parker, Esqs., Attorneys of Record for Respondent Audrey Cosden, 700 Keyser Building, Calvert and Redwood Streets, Baltimore, Maryland 21202; Robert C. Prem, Esq., Attorney of Record for Respondent Audrey Cosden, 929 N. Howard Street, Baltimore, Maryland 21202; Christina L. Madden, Respondent *Pro Se*, 433 East 51st Street, New York, New York 10022; Rignal W. Baldwin, Esq., Attorney of Record for Respondents Anne M. Hallenbeck and Jayne M. Humphreys, Semmes, Bowen & Semmes, 10 Light Street, Baltimore, Maryland 21202; and Honorable Stephen H. Sachs, Attorney General of the State of Maryland, and Diana G. Motz, Assistant Attorney General of the State of Maryland,

Attorneys of Record for Respondent Sharon Mech, official reporter of the trial court, 1400 One South Calvert Building, Baltimore, Maryland 21202.

Peter H. Madden, Esq.
Attorney for Petitioners
Box 609
New York, New York 10022

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

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**NO.**

---

PETER H. MADDEN and MICHAEL J. MADDEN,

*Petitioners,*

v.

MERCANTILE-SAFE DEPOSIT AND TRUST COMPANY, Trustee of the Trust u/w of William R. Hammond, deceased, and in its individual capacity; AUDREY COSDEN; and the following parties listed of record, but inactive in the court of last resort below, namely CHRISTINA L. MADDEN, ANNE M. HALLENBECK, JAYNE M. HUMPHREYS, and SHARON MECH, official reporter of the trial court,

*Respondents.*

---

**ENTRY OF APPEARANCE**

MR. CLERK:

The Clerk will enter my appearance as counsel for the Petitioners above-named.

The Clerk is requested to notify counsel of action of the Court by means of regular mail.

Peter H. Madden, Esq.
Box 609
New York, New York 10022
Tel.: 212-744-4794

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

## No. 79-363

PETER H. MADDEN AND MICHAEL J. MADDEN,
*Petitioners,*

v.

MERCANTILE-SAFE DEPOSIT AND TRUST COMPANY, TRUSTEE, ETC., ET AL.,
*Respondents.*

## BRIEF OF RESPONDENT MERCANTILE-SAFE DEPOSIT AND TRUST COMPANY, TRUSTEE, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

H. VERNON ENEY,
1800 Mercantile Bank and Trust Bldg.,
Baltimore, Maryland 21201,
J. COOKMAN BOYD, JR.,
Attorneys for Mercantile-Safe Deposit and Trust Company, Trustee.

October 4, 1979

The Daily Record Co., Baltimore, Md. 21202

## INTRODUCTION

This brief will omit separate formal Argument, in the interest of brevity, because the matters and grounds why this case should not be reviewed by this Court are apparent just from the corrections we have made below in the Questions Presented and Statement of the Case contained in the petition.

The Court of Special Appeals of Maryland has correctly decided state law questions only and has not decided a federal question of substance not heretofore determined by this Court or in a way probably not in accord with its decisions. Nothing, either of supposed fact or law, especially nothing of substantial federal law, set forth in the petition tends to show that the review sought is either desirable or in the public interest. On the contrary, it would be undesirable and against the public interest to issue the writ. This baseless, expensive case has already consumed seven years in the courts and now should be permitted to rest.

## QUESTION PRESENTED

Madden's* Questions Presented, as he describes them in pages 3-8 of the petition, are not properly presented, mainly because the description embodies numerous, serious, fundamental misrepresentations concerning (1) the facts which were established and found as facts by the trial Court, and approved on appeal as fully supported by the evidence, and (2) the actual decisions of the trial Court and the Court of Special Appeals. It also contains many completely unwarranted, slanderous aspersions upon the

* The petition is filed by Peter H. Madden *pro se* and as attorney for his brother, both beneficiaries of their great-grandfather Hammond's trust here involved, but, for convenience, it will be referred to in this Brief as the petition of Peter H. Madden, whose work it is and who, being a lawyer, must be held to have knowledge of his responsibilities as such.

character of those who opposed Madden's views, including the Maryland courts.

For example, the Trustee, which Madden sought to surcharge because of its sale in 1947 to its tenant, the Maryland Jockey Club, of a portion of the real estate on which the Pimlico Race Track was located, did not own, and could not, and did not, sell, a race track *business,* i.e., "business assets consisting of . . . race names . . . and *earning* power". The going race track business at Pimlico then already belonged outright, and for thirty-nine years had continuously belonged outright, to the Maryland Jockey Club, which, under a series of ordinary, conventional land leases, had independently operated that business for itself and its stockholders on the land leased from the Trustee, and not in any respect for, or as "tenant-agent" of, the Trustee, to whom its only obligation was to pay rent for the land. Again, the Jockey Club, as tenant, did not merely "contribute $200,000 in the form of its management organization and cash". It "contributed" by owning and operating the entire racing enterprise, except for the land owned by the Trustee, and had devoted thousands of dollars of its own assets to that enterprise.

Furthermore, the Maryland courts did not make any "dare-say fraudulent approaches", or make rulings "arbitrary and subjective", or otherwise: (1) that, in approving the adequacy of the Trustee's sales price for this real estate, the "standard of 'full fair market value' " should not be applied; or (2) that "the controlling standard be 'land salvage value' " or (3) that assets belonging to the Trustee "be disregarded or accorded no weight"; or (4) "that the land underneath the race track valued not for race track use, but for alternative residential use, was *the sole criterion* for testing for price inadequacy"; or (5) that "delicensing of Pimlico had occurred." The last point is Madden's circumlocution for a supposed ruling that, because continued renewal of a license for race track operation at Pimlico was then



seriously threatened by pending valid State legislation, the value of the land for possible race track purposes could not be considered nor given any weight whatever. What is more, the Maryland courts had no occasion to hold, and did not hold, that these supposed legal rulings, *which they did not make,* were constitutional under the due process clause.

Moreover, even if the Maryland Courts had made the rulings Madden falsely attributes to them, there would be no occasion for this Court to review them, for the decision below is fully supported by adequate and independent state grounds. The trial court found that, even if Madden's valuation theory was accepted, the evidence established that the price received by the Trustee in the 1947 sale was adequate (App. 48a), and both the trial court and the Court of Special Appeals of Maryland held that the Trustee had committed no breach of its duties of care and loyalty. (App. 21a, 22a-28a, and 46a).

The fourth Question Madden presents is whether this Court should make a "specific ruling as to damages" because of the Maryland judiciary's "clear bias toward out-of-state remaindermen" alleged to exist because the Court of Special Appeals of Maryland reasonably refused him permission to file a brief on appeal exceeding 300 pages, which he nevertheless printed and persisted on four occasions in trying to file. Manifestly this Question is as frivolous and eccentric as his others. That long-suffering Court, with outstanding patience and consideration, permitted Madden to file a brief of 175 pages (125 pages longer than that permitted by the Court's general rule), which contained all of his valuation contentions.

## STATEMENT OF THE CASE

For the same reasons (i.e., blatant, gross misrepresentations of substance contained therein far too numerous for complete correction), the Trustee is, of course, dissatisfied with Madden's Statement of the Case set

forth in pages 3-7, inclusive, and continued in pages 11-41, inclusive, of the petition. Here again, Madden's fundamental and all pervading error — the key to this whole tragic, expensive, baseless case — lies in his persistent fixation or delusion that the Trustee owned and sold, not merely a piece of improved real estate, but *a race track business* (which of course, it did not own and which was owned outright and operated by its lessee, the Jockey Club) and that the Trustee should have received as a selling price the capitalized value (on a return of 9.5%), not just of the annual income from the land which it received in the form of rent, but of that rent *plus the annual earnings of the Jockey Club from the licensed racing enterprise* which it owned and conducted. Madden's petition discloses (p. 27) that the $644,393, which he claims was the 1942-46 average "Pimlico" net earnings, consists of $567,527 (88%) which belonged outright to the Jockey Club, and of only $76,866 (12%) which belonged to the Trustee; and that the grossly inflated $6,779,014, which Madden claims is the capitalized value of those earnings at 9.50%, consists of $5,965,532 attributable to the Jockey Club's business efforts and of only $813,482 attributable to the Trustee's real estate.

The only proper *Statement of the Case* is the following:

In 1905, Hammond, Madden's great-grandfather, acquired land at Pimlico, a suburb of Baltimore, on which a race track and racing facilities had long been located. In 1908, he leased this improved land to the Maryland Jockey Club, which independently operated the racing business there. In 1909, he died, leaving his estate, including the leased Pimlico real estate, to the Trustee, in trust (with full power to sell or lease) to pay the income to his daughter, an only child, for life. On the death of the life tenant (which occurred in 1972) this trust was to cease and the estate was to be distributed outright to the life tenant's descendants, including her grandson Madden.



In 1913, the Trustee renewed the Hammond's lease to the Jockey Club and thereafter continued it as tenant under a series of four leases, similar to the first except for increases in rent, the last to expire in 1949. As we have said, the Jockey Club continuously owned outright, and independently operated, the Pimlico racing business, having and exercising the only state license to do so, making all the decisions, paying for all the physical improvements, buying adjoining land for stables and parking, developing race names, dealing with the State Racing Commission, complying with racing regulations, attracting, and contracting with, race horse owners, defraying all the operating expenses, insurance, rent and taxes, bearing all great risks of the hazardous racing business, and receiving (as it was entitled to receive) all the net income in most of the years, and sustaining net losses in the depression years. The Trustee, of course, was entitled to, and received, nothing except the stipulated rent.

The Jockey Club before 1947 became dissatisfied with the Pimlico site and threatened, and took serious steps toward, the abandonment of Pimlico as a track licensed for racing and the transfer of its licensed racing business to a new location, if it could obtain legislation from the State permitting it to do so. There were two reasons for this: (1) the land was not large enough to accommodate automobile parking demands; and (2) the tenant objected to paying for physical improvements demanded by the State Racing Commission, which, when made, would become the property of the Trustee.

In early 1947, Senate Bill 101, a State administration measure, was introduced in the Maryland Legislature to amend the existing statutory law which limited racing to only four locations in the State, to permit the abandonment of Pimlico as one of the racing sites and to permit the Jockey Club to be licensed at a new location. The evidence showed that the value of the real estate owned

by the trust for use as a race track was $1,540,000 but that, if Senate Bill 101 was enacted and the Jockey Club was permitted to move, Pimlico could no longer be used as a race track and its value would have been only $540,000 at its highest and best use of residential development. Senate Bill 101 was passed in the Senate to the third reading, but the Trustee, by strenuous lobbying efforts, succeeded, *by the margin of one vote,* to have the bill amended so that, if passed, there could be five race tracks, Pimlico remaining as one of them. Active and weighty opposition to the Trustee's amendment, however, still existed and there was considerable danger in February and early March of 1947 that the less drastic amendment might ultimately be lost and that Senate Bill 101 as originally introduced would become law.

Faced with the threat of losing its tenant and the more serious legal threat that its real estate might well become substantially reduced in value by being restricted to use for residential development purposes only, the life tenant and the Trustee, acting together, carried on lengthy negotiations to sell the real estate. Based on two appraisals which it obtained from outstandingly competent appraisers, including Day & Zimmerman, and upon a capitalization of the average rentals it expected to receive, the Trustee's first asking price was $1,540,000. A sale to the Jockey Club was finally agreed to in March 1947 at a price of $1,115,000 plus some additional rent. The life tenant, by her attorney, actively advised and participated in these months of negotiations and desired the sale and fully approved the price.

Shortly after the life tenant died in 1972, Madden and his relatives instituted the present suit to surcharge the Trustee because of this sale transaction in 1947, twenty-five years earlier. There were two trials. In the first trial, consuming fifteen trial days, the trial Court dismissed the complaint at the close of Madden's evidence. The Court of Special Appeals, finding expressly, however, that there



was sufficient evidence to uphold the findings against Madden on all his claims, reversed the judgment on procedural grounds so that fact findings could be made regarding them.

The second trial was a lengthy, plenary, painstaking one consuming fifty-six trial days with twenty-one additional witnesses from both sides, and with 185 new exhibits. At its conclusion, the trial Court, in a transcribed oral opinion, made detailed specific findings of fact, all of them, without exception, in favor of the Trustee. On Madden's second appeal, the Court of Special Appeals dealt with a printed Record Extract, which Madden prepared, comprising 6,472 pages in 23 volumes, considered Madden's brief of 175 pages and affirmed the trial Court's judgment, except as to certain counsel fees, holding that its findings of fact were sufficiently supported by competent evidence. Madden, although on four occasions he had repeatedly tried to force his 300 page brief on the Court, did not trouble to attend or be represented at the oral argument. Six Maryland judges have unanimously recognized that findings of fact were supported and valid compelling the conclusions that there were (1) no breach of trust, and (2) no inadequate price. The Court of Appeals of Maryland denied petitions by Madden and others for certiorari to review the judgment of the Court of Special Appeals "as there has been no showing that review by certiorari is desirable and in the public interest."

## CONCLUSION

In the above discussion of Madden's Questions Presented and Statement of the Case, the Trustee has shown that no constitutional or other federal question of substance is involved, and that the judgment of the Court of Special Appeals of Maryland should not be reviewed. It submits that the petition for certiorari should be denied.

Respectfully submitted,

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